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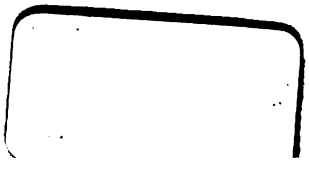

CASES

DECIDED IN

THE HOUSE OF LORDS,

ON APPEAL

FROM THE COURTS OF SCOTLAND,

1821—1823.

REPORTED BY

PATRICK SHAW, ESQ. ADVOCATE.

VOLUME I.

WILLIAM BLACKWOOD, EDINBURGH: AND
T. CADELL, AND J. BUTTERWORTH AND SON, LONDON.
MDCCCXXVI.

to embrace within each Report all those circumstances and pleas on which reliance seems to have been placed by the parties. One advantage will, at all events, be derived by the Profession from this work, if I shall be encouraged to continue it—I mean the facility that it will afford in consulting the Appeal Cases, which have hitherto been in a great measure unknown. For this purpose, I have subjoined to each Report the Number of the Case, as arranged in the volumes which are in the Advocates' Library.

Edinburgh, July 1825.

CASES

DECIDED IN THE HOUSE OF LORDS,

ON APPEAL FROM THE

COURTS OF SCOTLAND,

1821.

Sir J. G. SINCLAIR, Bart. Appellant.—*Leach—Cuninghame.* No. 1.
WILLIAM MANSON, Respondent.—*Grant—Jardine.*

Landlord and Tenant—Clause.—Held,—1.—That a clause whereby a tenant was bound to uphold old houses, and leave them in tenantable repair, with a power to build an additional steading, for which he was to receive payment at the expiry of the tack, did not entitle him to pull down the old houses, and insist for the value of a new and separate steading, but only for its value as an *additional* steading; and,—2.—That he was entitled to that value as at the expiry of the tack, and not merely to indemnification of his outlay.

Feb. 21. 1821.
1ST DIVISION.
Lord Succoth.

THE farm of Borrowstoun in the county of Caithness was, prior to 1785, possessed under a lease of twelve years, obtained from the appellant's father by John Manson. By this lease, Manson was bound 'to keep, uphold, and maintain the whole houses here-'by set in sufficient tenantable condition during the tack, and to 'leave them so at their removal.' At the expiration of it, there were on the farm a servant's dwelling, a stable, a byre, two barns, with a kiln and an oxen house, appropriated to the principal tenant, besides cot-houses inhabited by subtenants. A new lease was granted in 1785 by the father of the appellant to Manson for 21 years, at a rent of £105, from Whitsunday, by which the tenant and his successors bound themselves to keep, uphold, and maintain 'the whole houses hereby set in sufficient tenantable condi-'tion during this tack, and to leave them so at their removal, 'with this provision and declaration, that the timber on the seve-'ral subtenants' houses shall now be appraised and valued at the 'sight of two neutral men, one to be chosen by each party, and 'the like appraisement and valuation shall be made at the issue

Feb. 21. 1821. ‘ of this tack ; and that the outgoing tenant shall pay to, or receive ‘ from the proprietor, or incoming tenant, according to the differ- ‘ ence of these valuations to be made by neutral men as aforesaid.’ It was also ‘ specially provided and agreed, that in case, during ‘ the currency of this lease, the said John Manson or his foresaids ‘ shall build an additional steading on the said lands, or shall en- ‘ close any part of the grounds hereby set with stone dikes, or ‘ with hedge and ditch, or make any plantations of trees, at their ‘ own expense, they shall have allowance of the value of such ‘ steading, and of the value of such enclosures and plantations of ‘ trees, at the issue of this tack, from the said Sir John Sinclair ‘ or his foresaids, according to a valuation to be put thereupon at ‘ the term of removal by two neutral men as arbiters, one to be ‘ chosen by each party, whom the parties shall be obliged to name, ‘ and whose determination shall be final in manner foresaid.’— Soon after the commencement of this lease, John Manson pulled down the old houses, and erected a new steading, (consisting of a large farm-house and extensive offices,) in the building of which he employed part of the materials of the old houses. In the mean while, the appellant, then an infant, succeeded as heir of entail to the estate; and two years thereafter, the respondent, William Manson, acquired right to the lease, on the death of his father John. At the termination of it, he required the appellant, as landlord, to nominate an arbiter, for the purpose of valuing the steading, in terms of the lease; and the appellant having failed to do so, Manson presented a petition to the Sheriff of Caithness-shire, praying him to appoint proper persons to value the houses and fences. Warrant was granted accordingly, and a proof was allowed to the appellant, and taken, as to the extent of the buildings originally on the farm at the date of entry. The inspectors reported that the value of the house and offices amounted to £758 : 5 : 5¼, for payment of which sum Manson raised an action in the Court of Session. This action having been objected to on the plea of lis alibi pendens, an advocation ob contingentiam of the Sheriff Court process was brought and conjoined with it. On advising memorials, and in reference to the pleas of the parties, Lord Succoth, on the 12th of May 1815, found, ‘ That it appears from the proof adduced before the Sheriff of ‘ Caithness, that the steading upon the farm of Borrowstoun, be- ‘ longing to the defender, (the appellant,) was both incomplete ‘ and in bad repair at the commencement of the lease granted in ‘ the year 1785 to the pursuer’s father; and although the proof ‘ were not satisfactory, the stipulations in the lease, upon which ‘ the present question depends, afford real evidence that this was

'the case: That by an express clause in the said lease it was pro- Feb. 21. 1821.
'vided, that in case the tenant should build any additional stead-
'ing on the said lands, he should have allowance of the value of
'the said steading at the issue of the tack: That no restriction is
'put upon the tenant by this clause, as to the nature or extent of
'the steading which he might build upon the farm, and that it
'did not impose an obligation on the tenant to communicate the
'plans of the intended buildings to the landlord, or to give him
'formal intimation before commencing them: That the pursuer's
'father did erect a new steading, consisting of a slated dwelling-
'house and farm-offices, which must have taken considerable time
'to erect, and that no complaint was made at the time by the
'landlord that they were too large, and not suitable to the farm,
'nor any objection made until the pursuer came to demand the
'value of the same at the expiry of the lease: That even after
'the cause came into this Court, the objection stated by way of
'defence was, not that they were too large for the farm, but that
'the expense exceeded ten years' rents, (which does not seem to
'be true in point of fact): That although, by a clause in the
'lease, the tenant was bound to keep the whole houses upon the
'farm in sufficient tenantable condition, yet that, according to a
'fair and rational construction of this clause, he was not bound
'to maintain old houses after he had built new ones sufficient for
'the farm; and therefore that the argument in defence, founded
'upon a supposed breach of covenant in this respect on the part
'of the pursuer, is not well founded: That as the interest of the
'money laid out in building the new steading would be at least
'equal to the sum which it would cost the tenant to keep the old
'steading in repair, the defender is not entitled to insist for any
'deduction on account of the pursuer having been saved the ex-
'pense of keeping the old houses in repair: Therefore, as the re-
'ports and valuations, which were made by tradesmen appointed
'by the Sheriff, are not objected to, and appear to have been
'made after a minute examination of the premises, finds the de-
'fender liable in the sum of £758: 5: 5¼, being the amount of
'the valuations of the houses, with interest from the expiry of the
'lease, viz. Whitsunday 1806.'—To this interlocutor the Court, on the 14th of November 1816, adhered, and issued an interim decree for £700; and they refused a petition, without answers, on the 12th of December thereafter.*

Against these judgments Sir J. G. Sinclair appealed, 1. Because they proceeded upon a misinterpretation or misconception

* Not reported.

Feb. 21. 1821. of the real nature of the agreement between the predecessors of the parties contained in the lease. That agreement, he contended, was, that any new buildings which the tenant was to be entitled to demand compensation for from the landlord, were merely such as were necessary or proper additional buildings, over and above the other houses which were to be at all events upheld; whereas the Court of Session, by their judgment, had made a new covenant for the parties, and had found that the tenant was entitled to build an entirely separate and new set of farm-offices, under the name of an additional steading, without reference to the accommodation which was previously on the farm. 2. Because the additional buildings were unsuitable to the farm, seeing that the value of them exceeded the rents of seven years, and no deduction had been allowed on account of the materials of the old houses, or the timber of the subtenants' houses; and, 3. Because the tenant was not entitled to the value of the buildings as at the date of removal, but merely to the sums actually expended by him in the erection of them, the object of the clause being to secure to him indemnity against actual loss. To this it was answered, 1. That as the former houses were ruinous, the true meaning of the clause was that which had been put upon it by the Court of Session, and that it was not necessary, after the new steading had been erected, to expend sums in keeping up the old houses. 2. That, as the farm was now let at £400 per annum, the steading was not unsuitable, and the price did not exceed two years rent; but, at all events, as there was no limitation in the lease as to the amount of the sum to be expended, and as no objection was made when the houses were erecting, the appellant was bound to pay the fair value; and, 3. That the clause in the lease was explicit as to the time at which the additional steading was to be valued, and the amount paid. The House of Lords found, 'That, according to the terms of the lease, the tenant was bound to keep, uphold, and maintain the whole houses set in sufficient tenantable condition during the tack, and to leave them so at his removal, subject to the particular provision respecting the timber on the subtenants' houses, and that the tenant was not authorized by any provision in the lease to pull down the old buildings without rebuilding the same, or substituting other buildings instead thereof; but inasmuch as the tenant was authorized by the terms of the lease to build an additional steading, and has built an entire new steading, and pulled down the old buildings, he is entitled to so much of the value of such new steading as ought to be considered as an additional steading, and not a substitution for the old buildings,—subject, nevertheless, to the particular pro-

'vision in the lease touching the timber on the subtenants' houses. Feb. 21. 1821.
'And the Lords farther find, That, according to the terms of
'the lease, the respondent is entitled to be allowed for so much
'of such new buildings as, consistently with the former finding,
'he is entitled to have an allowance for, according to a valuation
'to be put thereon at the time of removal, and not according to
'the actual expenditure in making such new buildings. And it
'is ordered, That, with these findings, the cause be remitted back
'to the Court of Session in Scotland, to do therein as is just and
'consistent with such findings.'

Appellant's Authority.—Ducat, May 14. 1803, (15264.)

J. CAMPBELL,—J. RICHARDSON,—Solicitors.

(*Ap. Ca. No.* 3.)

Sir HENRY HAY M'DOUGALL, Bart. Appellant.—*Romilly—Leach—Forbes.* No. 2.

Rev. DAVID HOGARTH, Respondent.—*Clerk—Jardine.*

Valuation—Proof.—Held (affirming the judgment of the Court of Teinds) that an old extracted decree of valuation, in which the numerical word fixing the value had been almost entirely worn away, and a hole left, could not afford evidence of the value of the teinds, although it was the opinion of persons of skill that the word must have been either ten or twa.

IN 1814, the Reverend David Hogarth, minister of the parish of Makerston in the county of Roxburgh, raised a process of augmentation and locality, in which, after the Court had held the heritors as confessed upon the rental, and had remitted the cause to Lord Reston, Sir Henry Hay M'Dougall, the proprietor of the whole parish, (with the exception of a small farm,) gave in objections, and produced an extracted decree of valuation of the teinds of Makerston in 1635 by the High Commission, which, he alleged, established that the value of the teinds was fixed at two, or, at all events, at ten chalders. This extracted decree embraced several other lands, and was quite entire in every respect except at the numerical word ascertaining the number of chalders at which the teinds of Makerston were valued. This word, in consequence of the folding of the paper, stood at one of the corners, which was worn away, and a small hole left. So far as related to Makerston, the decree was in these terms: 'Find and declare 'the just worth and yeirlie availl of the lands underwritten, per- Feb. 23. 1821.

TEIND COURT. Lord Reston.

Feb. 28. 1821. 'tening to the persones above and efter nominat heritablie, lyand 'within the said parochin of M'Kerston, to be in personage teind 'the quantities of victuell underwritten, of the qualities efter 'spect., ilk ane of the saidis heritors as follows: To witt: The 'landis, town, and maynis of M'Kairstoune, Luntonlaw, Meir-'done, Nether Maynis, Manerhill, with their pendicles and per-'tinentis perteining heritablie to the said Sir William M'Dougell 'of M'Kairstoun, Knight, to be worth in personage teind 'chalderis victual, tua part cheritet beir, and thrid pairt heipet 'ait meill, all of the old mett and measour of Jedburgh.' Sir Henry alleged, that at the blank space preceding the word 'chal-'deris,' the upper horizontal line of the letter T was perceptible, and that it was impossible that more than two letters in addition could have been comprised within the space, so that the word must have been either Ten or Tua; and he stated that he was willing to adopt the former. To this it was answered, That the word was altogether illegible; that therefore as it was impossible to ascertain the extent of the valuation, the decree was ineffectual to any extent whatever; and that, accordingly, it had been disregarded by the Court in three separate processes of modification in 1720, 1799, and 1805. Lord Reston, before answer, remitted to Mr. John Dillon, writer in Edinburgh, and Mr. James Miller, one of the Teind clerks, 'to examine said decree, and to depone 'as to their opinion of the disputed word therein.' The former gentleman reported, that it appeared to him that the first letter was a T, and 'that the space which the remainder of the word 'has occupied could not well contain more than two letters; and 'it is most probable the word was either Twa or Ten; but, in 'the present state of the paper, the deponent cannot take upon 'himself to say, from any thing that now appears on the face of 'the paper, which of these two words was originally written; but 'upon measuring with a pair of compasses the space occupied by 'the word Tua in the third line below the word in question, it 'appears to be of the precise same extent as that word.' In this opinion Mr. Miller concurred. The Lord Ordinary having made great avizandum, the Court remitted to Mr. Thomas Thomson, advocate, to examine the decree, and to give his opinion as to what the word had been. After mentioning several circumstances, he reported that, 'Without presuming to state it as any thing 'more than a probability, I am of opinion that the word is more 'likely to have been Ten than Twa or Tua, the only two nume-'rical words which I can conceive it possible to have stood in this 'part of the writing.' Thereafter the Court, on the 6th of March 1816, 'sustained the objections made for the pursuer to the de-

'creet of valuation produced and founded on by the defender, Feb. 23. 1821.
'Sir Henry Hay M'Dougall of Makerston, and remit to the Lord
'Ordinary to prepare a scheme of the rental accordingly, and to
'report.' To this interlocutor they adhered on the 20th of November thereafter.*

Sir Henry then appealed, and contended, that as it was undoubted that there had been a valuation, a right was thereby created in his favour to some extent or other; that when a right has once been legally constituted by a valid and effectual grant, it would be unjust to deprive the party of the benefit of this, merely by the loss of the evidence itself, if the import of it can be supplied; and that accordingly it was competent, where an entire deed had been lost, to prove its tenor by other evidence, so as to restore to the party the evidence of his right. On this principle he maintained, that the Court were entitled to supply the word which was wanting,—and that the above reports, together with a collateral argument deducible from the valuations of the other lands in the decree, afforded sufficient evidence that the obliterated word was either two or ten. To this it was answered, That it was incumbent on the appellant to instruct, by the production of such a decree of valuation as a Court of Law can safely proceed upon, that his teinds had been valued at a certain amount; that he was bound to do so by a regular probative document, complete in its essential parts; that he was not entitled to supply a radical defect by probable reasoning; nor could a Court of Law in such a question balance probabilities, and lean to that side to which the evidence on the whole seemed to preponderate; and that this was just one of those contingencies in regard to an old writing, the loss of which must fall upon the party who claims under it. The House of Lords ordered and adjudged, that the appeal 'be dis-
'missed, and the interlocutors complained of affirmed, with £200
'costs.'

The Lord Chancellor, after alluding to another case, observed—There is another cause that is appointed for judgment, the case of Sir Henry Hay M'Dougall of Makerston, Baronet, and the Rev. David Hogarth, minister of the parish of Makerston; and it will be recollected by your Lordships, that the principal question in that case was, whether the Court of Teinds ought to have considered a certain blank in a decree of 1635, as if it were filled up with the word *ten*; and whether they ought to have found, that upon the inspection of the decree, or upon the effect of the testimony, (such as it was exhibited in the cause, in order to show

* Not reported.

Feb. 23. 1821. that the word had originally been ten, or any other number,) the instrument was perfect,—an instrument demonstrating the number of chalders of victual which originally stood in this decree.

My Lords, I will call your Lordships' attention to the act of 1707. This paper, which was produced before us, is not an original record; but it is an extract, and an extract which must be considered as having been in possession of the party who now insists that it ought to have the effect of a complete record,—an extract which has been in their possession and custody. The obligation upon them was to preserve that in such a state, that what it did manifest, it should manifest with reasonable clearness, and reasonable certainty. My Lords, in the year 1707, an act was passed in Scotland, entitled 'An act for the plantation of kirks and 'valuation of teinds;' and that act proves that the registers of the Court of Teinds had been lost; 'and for supplying the lost registers of that 'Court, Her Majesty and the said Estates do hereby appoint and ordain that any authentic extracts from the said records be brought in.' We have had no doubt raised before us, whether this is an authentic record, the question being not on its authenticity, but upon its contents. 'And the said records, being presented to the said Lords, be recorded 'in a particular register, and that the said extracts so brought in be kept 'by the Lord Clerk Register, and his Depute Clerks to be appointed by 'him for that effect, as their warrants, which shall be held and repute 'as valid and authentic as the principal warrants themselves, if the same 'were yet extant. And the Lord Register and his Deputes are ordained 'to give a new extract gratis to every person that shall give in an old 'extract immediately upon delivery thereof; and that extracts from 'these new records shall make the like faith in judgment, and outwith 'the same, as the extracts from the old registers of the commission were 'wont to do before the same were burnt.' If the present extract was as defective in the part in which the defect now appears at the time this act passed, as we now see that it is, to be sure, giving a copy of the extract with as little manifestation of what the word was, as there is now, was doing nothing material. Under this act a question may arise, whether, if this extract had been carried in, what follows in the act would not have authorized the Court to have inquired into what were the original contents of the original register at this period of 1707; and that depends upon the words which I am now about to read: 'And 'further empowering the said Lords, upon such evidents and adminicles 'as they shall see cause, to make up the tenor of such decreets in man-'ner above mentioned, whereof extracts are amissing, and the registers 'lost in the said fire.' If this clause is to be interpreted as applying only to extracts that are wholly lost, and to the registers lost in the fire, to be sure this clause could not be taken to apply to such an extract as we have before us. If, on the other hand, a construction can be put on that which could have authorized the Court to make up the tenor of this decree in the part in which the word is lost by wear, at present they

might make it up. So far, then, an application might have been made to the Court of Teinds under this act of Parliament. Feb. 23. 1821.

It appears that, as long ago as 1720, this instrument had been considered as unintelligible, and repeatedly since; and the question upon the whole is, Whether you have such a degree of certainty arising out of this instrument as will authorize you to reverse that which has been the judgment of the Court of Teinds. My Lords, this is not an original record of a decree which was lost, but it is an extract in the keeping of the party, and therefore you cannot apply the same principles in favour of the appellant as you might apply to it, if it was the record itself that had been in the keeping of the law; and considering what has happened between the year 1707, or rather between the year 1720, and the present time, it would be going a great deal too far to say, that with this evidence the word was ten, and that it should settle the question between the parties. My own opinion is, that that cannot be admitted under the circumstances of the case; and as the Court of Teinds have repeatedly held this to be unintelligible, it seems to me that the party ought to have his costs in this case.

Lord Redesdale.—I agree with the Noble Lord. It seems to me, that the evidence which is offered is evidence to prove, that some teinds of the parish have been valued; but it does not follow that the teinds in question have been valued; for it does not appear clear from any thing that I can find, that the valuation of the particular teinds in question was not left in blank at the pronouncing of the original decree. If so, the decree itself was imperfect, and operated nothing as to these particular teinds. In respect to the teinds in question, my Lords, the act of 1707 having afforded a remedy to those persons who might otherwise have lost their remedy by the destruction of the records of the Court which had taken these valuations, it was the duty of all persons who were in that situation immediately to proceed to establish their right under those valuations; and in the year 1707, therefore, it was the duty of the persons who were then entitled to the estate of Sir Henry Hay M'Dougall to have brought this extract into Court, there to have had it recorded as evidence of that which then appeared clear upon the extract; and if there was then any deficiency of the extract occasioned by accident, to have supplied by evidence that defect. That evidence, in the year 1707, might probably easily have been produced; but to suppose that that evidence can now be produced, is a supposition that can scarcely be maintained. It is not absolutely impossible, but it is nearly so; and therefore it does seem to me that the parties have lost their right, if they had the right, by their own negligence. Above a hundred years have elapsed since it was their duty to have taken this step. They have neglected to take the steps to avail themselves of the relief the act gave them, and that is in itself a strong ground for presuming that they were incapable, in the year 1707, of supplying the defect. My Lords, in the year 1720 there was a proceeding which called upon them directly to

Feb. 23. 1821. supply the defect; but, instead of supplying it, they admit the defect was incapable of being supplied. Having themselves, in the year 1720, thus admitted the fact, that the defect was incapable of being supplied, are we, at the distance of a hundred years, upon conjecture, to supply that defect? It appears to me, therefore, that the party has lost his right by his own negligence, and that originally the decree was defective in that point, and I presume it was defective,—that is, that there was originally a blank, which is now attempted to be supplied; because all that has been now offered to the Court to supply that defect was equally capable of being offered in the year 1720; and, in subsequent proceedings, the parties have admitted they could not supply the defect. Under these circumstances, I conceive that it is fit that what has been done by the Court below should be affirmed.

Appellant's Authorities.—28. Voet. 4. 2; Matheus de Prob. l. 3. c. 131; Earl of March, July 9. 1748, (15820); Nimmo, July 9. 1771, (15825); Cranstoun, Jan. 22. 1674, (15794); Cunninghame, June 1674, (15794); 4. Ersk. 2. 24; Gilbert's Law of Evid. 301.

Respondent's Authority.—Bacon's Abridg. p. 700, voce *Obligation.*

SPOTTISWOODE and ROBERTSON,—J. CAMPBELL,—Solicitors.

(*Ap. Ca. No.* 6.)

No. 3. JOHN DINGWALL, Appellant.—*Lord Advocate Maconochie—Romilly—Horner—J. A. Maconochie.*
Rev. GEORGE GARDINER, Respondent.—*Leach—Connell.*

Manse—Stat. 1663, *c.* 21.—Held, (contrary to the judgment of the Court of Session,) that where a manse has been built and has become ruinous, the first clause of the statute 1663, c. 21. relative to the building of manses, and limiting the expense to £1000 Scots, does not apply; but that the second clause as to repairs, and which is unlimited, is applicable; and therefore the judgment of the Court of Session, awarding £1000 sterling, was affirmed.

Mar. 2. 1821. IN 1814, the Rev. George Gardiner, minister of the parish of Aberdour in the county of Aberdeen, presented a petition to the presbytery of Deer, founding on the statute 1663, c. 21. stating that his manse and offices were ruinous and untenantable, and praying for decree against the heritors to rebuild them. By this statute it is enacted, that 'Because, notwithstanding divers acts of 'Parliament made before, divers ministers are not yet sufficiently 'provided with manses and glebes, and others do not get their 'manses—therefore, &c. ordains, that where competent manses 'are not already built, the heritors of the parish, at the sight of 'the bishop of the diocese, or such ministers as he shall appoint, 'with two or three of the most knowing and discreet men of the

2D DIVISION. Lord Pitmilly.

'parish, build competent manses to their ministers, the expenses 'thereof not exceeding one thousand pounds, and not being be- 'neath 500 merks; and where competent manses are already 'built, ordains the heritors of the parish to relieve the minister 'and his executors of all costs, charges, and expenses, for repair- 'ing the foresaid manse; declaring hereby, that the manses be- 'ing once built and repaired, and the building and repairing 'satisfied and paid in manner foresaid, the said manses shall 'thereafter be upholden by the incumbent ministers during their 'possession, and by the heritors, in time of vacancy, out of the 'vacant stipend.' After causing an inspection to be made, from which it appeared that the manse (with the exception of one wing) and the offices were in the condition alleged by Mr. Gardiner, and after receiving estimates, the presbytery ordained the heritors to rebuild them, and decerned for £1214: 14: 10 sterling. Of this decree Mr. Dingwall, the patron, and one of the principal heritors of the parish, brought a suspension, in which he mainly contended that the sum was too large. Lord Pitmilly remitted to Mr. Laing, architect, to inspect and report, after issuing a note, in which he observed, that 'there is no ques- 'tion about the repairing or adding to a manse already built; 'that it seems admitted that a new manse and offices must be 'erected; and the point to be determined is, whether the plan 'produced by the heritors, or the plan produced by the minister, 'should be adopted? or what alterations should be made in 'either, or if any new and different plan should be adopted?' On advising the report, Lord Pitmilly, on the 11th of March and 12th of May 1815, remitted to Laing to adopt either of the plans he thought fit, or a new one, but the expense of which was not to exceed £1000 sterling. Against this interlocutor Mr. Dingwall presented a petition, and contended, that in terms of the statute 1663, c. 21. the sum could not exceed £1000 Scots (£83: 6: 8 sterling.) This petition the Court remitted to the Lord Ordinary, 'in respect that the plea stated in the prayer thereof, that 'the expense of the manse and offices, so far as leviable from the 'heritors, shall not exceed £1000 Scots, has not been urged be- 'fore the Lord Ordinary.' In reference to this plea, Lord Pitmilly, on the 16th of January 1816, found, 'That by the act '1663, c. 21. the heritors of parishes are ordered to build com- 'petent manses for their ministers; and that this express provi- 'sion of the statute, under the authority of which alone new 'manses can be built, could not in the present day be complied 'with, if the expense of the building were to be limited to the 'sums of money mentioned in the act of Parliament, which, with

Mar. 2. 1821.

Mar. 2. 1821. 'a view to the expense of building at the date of the act, was 'fixed at £1000 Scots as the maximum, and 500 merks as the 'minimum. That the clause in the statute, which provides that 'where manses are already built, the heritors shall relieve the 'minister of the expense of repairing them, does not limit the 'amount; and that these repairs therefore must frequently, in 'the present day, exceed the expense of building a new manse, 'as fixed in the act, although it must evidently have been the 'intention and understanding of the act that the expense of re-'pairing an old manse should be much less than the expense of 'building a new one, and that it should be for the interest of the 'heritors to repair rather than to build, while the reverse would 'be the case if the construction put upon the statute by the peti-'tioners were adopted. That the usage to this effect is not only 'uniform and long established, but was sanctioned by the Court 'in the case, referred to by the respondent, of the minister of In-'verury, after the point was litigated by one of the heritors.' His Lordship therefore refused the petition, and adhered to the interlocutor remitting to Mr. Laing. To this judgment the Court adhered on the 9th of July and 27th of November 1816.*

Mr. Dingwall then appealed to the House of Lords, on the ground, 1. That the statute 1663, c. 21. contained no authority for rebuilding manses, but only for building them where originally there had been no manses, and for repairing them where one had been built; and, 2. That, at all events, the sum to be expended could not exceed £1000 Scots; and that, although this sum was inadequate, yet the Court could not lawfully exceed the sum prescribed in the statute. To this it was answered, 1. That the statute ordained competent manses to be built and upheld; and therefore, when they became ruinous, the heritors were bound to rebuild them. 2. That the sums mentioned in the statute had reference to the period of its enactment; and as it ordained competent manses to be built, the Legislature could not have intended to limit the sum, so as to prevent this being accomplished; and therefore the Court were entitled to give effect to it, not according to its strict words, but to its true spirit; and, 3. That, at all events, the part of the statute as to the extent of the sum had fallen into desuetude, and in various cases decrees had been pronounced, and carried into effect, for sums of a much larger

* See Fac. Coll. Vol. 1815-1819, No. 74. It is there said, that 'at moving a peti-'tion by the heritors, none of the Court had the least doubt upon the point, but, at the 'request of the minister, allowed answers to be given in; upon advising which, they 'were unanimously of opinion, that the point was fixed by long and invariable practice.'

amount. The House of Lords found, 'That this case ought to be 'considered as falling within the meaning of that clause in the 'statute of 1663, c. 21. which relates to the repairing of manses, 'and not within the clause which relates to the building of manses, 'where manses had not been then already built: And it is 'ordered and adjudged, that with this finding, the said interlo- 'cutors of the 11th of March 1815, and the 12th of May 1815, 'and so much of the said interlocutor of the 16th of January '1816 as refuses the desire of the petition of the appellant, and 'adheres to the interlocutor reclaimed against, be affirmed: And 'it is further ordered and adjudged, that the said several other 'interlocutors be affirmed, with £100 costs.'

Mar. 2. 1821.

Appellant's Authorities.—(2.)—2. St. 6. 19; 1. Mack. 5. 12; 2. Bankt. 8. 121; 2. Ersk. 10. 55. 56; Carfrae, May 13. 1814, (F. C.)

Respondent's Authorities.—(2.)—1. Ersk. 1. 53.—(3.)—Min. of Inverury, Aug. 9. 1760, (not rep.); Mercer, March 17. 1786, (not rep.); 1. Ersk. 1. 45; 1. St. 1. 16; 1. Bankt. 1. 60; Duke of Hamilton, July 18. 1813, (Ho. of Lo.)

J. CHALMERS,—SPOTTISWOODE and ROBERTSON,—Solicitors.

(*Ap. Ca. No.* 7.)

ROBERT ANGUS and Others, Appellants.—*Romilly—Moncreiff.* DUNCAN MONTGOMERIE, D. WISHART, Captain JOHN MONTGOMERIE, and J. GULLAND, Respondents.—*Warren—Grant.*

No. 4.

Burgh Royal—Stat. 16. *Geo. II. c.* 11.—It having been held in the Court of Session, that where councillors of a burgh were elected for life, and had been long on the roll, and no new election was usual, and where no objection had been made to their continuing on the roll, the House of Lords, in the circumstances of the case, affirmed the judgment as to the respondents before the House.

a summary Complaint for regularity thereof was incompetent

Mar. 2. 1821.

1ST DIVISION.

ROBERT ANGUS and others, councillors of the burgh of Inverkeithing, presented a petition and complaint, under the 16th Geo. II. c. 11. against Montgomerie and others, stating that by the set of the burgh it was declared that 'the council 'consists of fifteen persons at least, viz. the Provost, two Bai- 'lies, Dean of Guild, and Treasurer, and ten or more inha- 'bitant Burgesses:' That the mode of election was ordered to be thus: 'Upon the 29th of September yearly, the Magistrates 'and old council meet in the forenoon within their tolbooth; and 'when those of the old council, who are desirous of an ease, have

Mar. 2. 1821. 'demitted their offices, they choose as many new councillors in 'their room to keep up the number; and first they elect the Pro- 'vost, then leets five of the council, and chooses two out of them 'Bailies for the ensuing year; next leets three, and chooses the 'Dean of Guild; and last two, and chooses the Treasurer; 'all swearing the oaths de fideli and secresie, and taking 'and signing the oaths, &c. for the time ordered to be 'taken, and the burgh letter anent elects read immediately there- 'after:' That, at the Michaelmas election of 1812, a general protest was taken against illegal votes; that Montgomerie and several others, including the respondents, were not 'inhabitant 'burgesses;' and that, notwithstanding, one of them had been elected bailie, and the others had been continued on the roll as councillors. They therefore prayed that they should be struck off the roll, and declared disqualified. To this Montgomerie &c. answered, that, by the practice of the burgh, the councillors were elected for life; that the allegations were not relevant to disqualify them; and it was averred that they were inhabitant burgesses. On this latter averment the parties being at issue, a proof was allowed and taken, on advising which, the Court, on the 2d of January 1816, found, 'That the said complaint is competent 'against such of the respondents as were continued on the roll 'of councillors of the burgh of Inverkeithing, at Michealmas '1812, in so far as they or any of them were by law disqualified 'from being continued: That by the set and constitution of the 'said burgh, the councillors thereof must be inhabitant burgesses, 'and therefore sustain the objections of non-inhabitantcy made 'by the complainers against the following persons on the said 'roll at Michaelmas 1812, viz. John Muckersy, John Gulland, 'David Wishart, William Fulton, and Captain John Mont- 'gomerie: That the said pursuers, and each of them, were dis- 'qualified from being so continued, or from acting as councillors 'of the said burgh, and grant warrant to and ordain the clerk of 'the said burgh to expunge their names from the said roll, and 'decern accordingly: Repel the whole objections to the con- 'tinuance of Duncan Montgomerie and Alexander Montgomerie 'on the said roll at Michaelmas 1812, and also repel the whole 'objections to the election of Alexander Montgomerie as a bailie 'of the said burgh at Michaelmas 1812, and assoilzie them and 'each of them from the conclusions of the said complaint, and de- 'cern, and find none of the parties on either side entitled to ex- 'penses of process.'

Both parties reclaimed, and Montgomerie and the other respondents, against whom judgment had been pronounced, now

objected, that as they had been previously elected councillors for life,—that as no new election was necessary, except where some of the councillors had 'demitted,'—and as no special objection had been made, nor any vote taken as to their continuing on the roll, no wrong had been done at the election by the Magistrates; and it was, therefore, not competent to deprive them of this right in a summary form, or to complain under the 16th Geo. II. c. 11. To this it was answered, 1. That the objection was too late, after issue had been joined and proof taken on the merits; and, 2. That a wrong had been done in continuing persons on the roll as councillors, who could not lawfully hold the office; and that it was not necessary to state special objections, because, as it is undoubted that a person not present at an election may competently complain of the proceedings at it, so the statement of any objection cannot be necessary to found the competency of such a complaint. The Court refused the petition of Angus and others; and, on advising that for Montgomerie and others, they on the 21st of May 1816, and 18th January 1817, 'Alter the interlocutor reclaimed against, and find the complaint incompetent, in 'so far as the same concludes against Captain John Montgomerie, 'David Wishart, and John Gulland, in respect there was no special objection stated against them at the Michaelmas election '1812, no vote put upon such special objection, and consequently 'no wrong done by the Magistrates at that election: Therefore 'dismiss the said complaint, and assoilzie the said John Montgomerie, David Wishart, and John Gulland from the conclu'sions of the said complaint, and decern;' and found them entitled to expenses in relation to this point.* Mar. 2. 1818.

Against these judgments, both on the point of competency and on the merits, so far as the qualification of the parties mentioned in the interlocutor of the 2d of January was sustained, Angus and others appealed; and appearance being made by Duncan Montgomerie, who had been found qualified, and by David Wishart, Captain John Montgomery, and John Gulland, who had been held disqualified, but who were successful on the objection to the competency, the House of Lords found, 'That, in the circum'stances of this case, an application by summary complaint to 'the Court of Session in Scotland could not be sustained with 'respect to the respondents now before this House. It is there'fore ordered and adjudged, that the appeal be dismissed, and the

* See Fac. Coll. Vol. 1815-1819, No. 87. From the report of the opinion of the Judges there given, they were unanimous in sustaining the objection to the competency.

Mar. 2. 1821. 'interlocutors complained of affirmed, so far as they relate to the 'respondents now before this House.'

Appellants' Authorities.—(Competency,) Wight, 340. 341; Kilk. 107. Andrew, Jan. 24. 1775, (1883); Marshall, Dec. 4. 1782, (1887); Tenant, Feb. 23. 1785, (1888); Harrowar, Dec. 5. 1812, (not rep.); Dempster, Mar. 3. 1791, (8868.)

Respondent's Authorities.—(Competency,) Andrew, Feb. 17. 1749, (1842); Dunbar, Jan. 7. 1757, (1855.)

J. CAMPBELL,—A. GRANT,—Solicitors.

(*Ap. Ca. No.* 8.)

No. 5.

Sir WM. F. ELIOTT, Appellant.—*Fullerton—Brougham.*
GEORGE POTT, Respondent.—*Dean of Fac. Ross—Mackenzie.*
Et è contra.

Entail—Lease.—Held,—1.—Reversing the judgment of the Court of Session, that a prohibition in an entail to *dispone*, fortified by irritant and resolutive clauses, deprived an heir of power to grant a lease for 77 years on a grassum, although the word *alienate* was not employed; and,—2.—Affirming a judgment, that a lease of 77 years, with a grassum, was an alienation.

Mar. 14. 1821.

1ST DIVISION. Lord Gillies.

BY the entail of the estate of Stobbs, executed in 1719 by Sir Gilbert Eliott, the prohibitory clause declares, 'That it shall not 'be leisome nor lawful to me, the said Sir Gilbert Eliott, nor to 'any of my heirs and successors foresaid, to sell, and I hereby 'bind and oblige me and them not to sell, annalzie, wadset, dis-'pone, dilapidate, and put away the said lands, baronies, and 'estate, or any part or portion thereof, heritably and irredeem-'ably, or under reversion, (except in so far as the faculties above 'written do extend,) nor contract or ontake debts thereupon, or 'grant bonds or other securities therefor, nor do or commit any 'other facts, deeds, or delicts, civil or criminal, whereby the said 'lands and estate may be anyways apprised, adjudged, forfaulted, 'evicted, or affected, nor to infringe, alter, or innovate this pre-'sent substitution, or course of succession, in defraud and preju-'dice of the subsequent heirs of provision above mentioned, con-'form to the order and substitution above specified: Neither 'shall it be lawful to me, nor to any of my heirs of provision 'foresaid, whether male or female, to suffer the said lands, ba-'ronies, and estate, or any part thereof, to be adjudged or ap-'prised for debts to be contracted, but shall be obliged to re-'deem the same within the space of eight years after deducing 'or leading any such diligence.' The irritant and resolutive

clauses, which immediately follow, are in these terms: 'And if 'I, or any of the said heirs, whether male or female, successive, 'shall contravene the premises, or do any fact or deed in preju- 'dice hereof, by the said heirs-female not using the sirname of 'Eliott, and my arms and title, or by the said unmarried heirs- 'female not marrying a gentleman who and their heirs shall not 'use the same, and my arms and title, as above, or by the said 'heirs-female, and they and their husbands and children, not 'using the said sirname, arms, and title, as aforesaid; or who, 'whether male or female, and I shall dispone the said lands and 'estate, or any part thereof, or contract debts, or commit any 'other fact or deed, during their respective marriages, or in 'favour of their respective husbands, wives, and children, (except 'in so far as is above provided,) whereby the said lands and 'estate may be evicted or affected in manner foresaid, or shall 'permit the same to be adjudged or apprised for any such debts 'and deeds, and not redeem the same within the limited time 'foresaid, after leading thereof; and if I, or any of the persons 'and heirs foresaid, whether male or female, shall infringe or 'alter the succession and substitution foresaid, then, and in any 'of these cases, not only shall all such deeds and contraventions 'to be done by me and the said heirs male and female, or any 'of them, during their respective marriages, so far as the samin 'may burden and affect the said estate, and infringe or alter the 'succession, be ipso facto null and of no effect, by way of excep- 'tion or reply, without any sentence of declarator to follow 'thereupon, but also I shall lose my right of liferent, and the 'other persons, doers of said deeds, and committers of said con- 'traventions, or any of them, shall amit their right of succession, 'and be debarred from said lands and estate; and all the infeft- 'ments and other rights thereof, shall from thenceforth expire, 'and become null and void, as if they had never been granted; 'and the same shall accresce to the next immediate person to 'succeed to the said estate, and so forth successive in case of 'divers contraventions, and that free of all debts, deeds, and de- 'licts done, contracted, or committed by the contraveners; and 'it shall be leisome to the next succeeding heirs to use and pro- 'secute any legal way or method competent for establishing the 'right thereof in their persons, or in the persons of the remanent 'heirs of provision foresaid, to succeed to them in manner above 'expressed.' Under this entail, the late Sir William Eliott, father of the appellant, entered into possession of the estate. On the 20th of March 1794, he granted a lease of the farms of Pen-

Mar. 14. 1821.

Mar. 14. 1821. chrise and Langside, consisting of between 4000 and 5000 acres, for 77 years, at a rent of £285, (which was restricted during his life to £200,) and on payment of a grassum of £2904: 15: 9. Sir William having died in 1812, his successor, the appellant, brought an action for reducing the lease, as being an infringement of the restrictions of the entail. In defence, it was pleaded, 1. That the irritant and resolutive clauses of the entail were so loosely, so inaccurately, and so unintelligibly worded, as to render the entail unavailable against third parties contracting with the heirs in possession; 2. (which was the main defence,) That supposing the irritant and resolutive clauses to be effectual to the extent of the acts of contravention there enumerated, they could not invalidate the lease; because, although that enumeration mentioned the act of *disponing*, yet it omitted that of *alienating*, under which alone, in the absence of any express limitation of the power of letting, the lease could be struck at as contrary to the restrictions of an entail; and, 3. That even if the act of alienating had been mentioned, a lease for 77 years was not an alienation. To this it was answered, 1. That although there was no doubt an error in grammar in the expression in the irritant clause, 'who, whether male or female, and I shall dispone said lands,' &c., yet the meaning was sufficiently clear, viz. that if the heirs, whether male or female, should dispone the lands or contract debts, then the irritating part of the clause should take effect. 2. That the terms *dispone* and *alienate* are generally used as synonymous, and that it appeared from various acts of Parliament, decisions, and institutional writers, that the term *dispone* was employed in reference to the granting of feus, long tacks, assedations, and alienations; and as it was made use of in the irritant and resolutive clauses, it was sufficient without the addition of the word *alienate;* and, 3. That a lease of the nature of that under reduction was truly an alienation.—Lord Gillies, on the 27th of January, and 19th February 1813, repelled the reasons of reduction, and assoilzied; and on the 17th of December he found that 'the lease 'in question having been granted in consideration of a grassum, 'and for a period of 77 years, is to be considered as an alienation, 'and that alienations are prohibited by the entail of the estate of 'Stobbs, but that the irritant and resolutive clauses in the same 'deed of entail contain no reference to the specific prohibition 'against alienating, such as is necessary to render the same effec-'tual against third parties;' and therefore adhered to the previous interlocutors. To these judgments the Court, on the 17th of Fe-

bruary and 10th March 1814, also adhered,* but found no expenses due. Mar. 14. 1824.

Both parties appealed—Sir William Eliott in so far as the Court had found that the deed of entail was not sufficient to prevent alienations,—and Pott so far as they had found that the lease was an alienation, and had not awarded to him his expenses. The House of Lords 'Ordered and adjudged that the said interlocutors of the Lord Ordinary, of the 27th of January 1813, and 'the 19th of February 1813, be reversed: And it is farther ordered and adjudged, that the said interlocutor of the Lord Ordinary, of the 17th of December 1813, be reversed, except so 'much thereof as finds that the lease in question having been 'granted in consideration of a grassum for a period of 77 years, 'was to be considered as an alienation, and as finds that alienations were prohibited by the entail of the estate of Stobbs: And 'it is further ordered and adjudged, that the said interlocutors 'of the Lords of Session of the First Division, of the 17th of 'February and 10th of March 1814, be reversed; and the Lords 'find, that, according to the true construction of the deed of entail of the estate, the prohibition to dispone extends to the lease 'in question, and that the irritant and resolutive clauses in the 'said deed of entail do so refer to the specific prohibition to dispone, as to render the same effectual against third parties; and 'therefore sustain the reasons of reduction of the lease in question: And it is further ordered and adjudged, that the cross 'appeal be dismissed this House, and the cause be remitted back 'to the Court of Session in Scotland, to do therein as shall be 'consistent with this judgment, and as shall be just.'

Appellant's Authorities.—(2.)—3. Craig, 2. 22; Reg. Maj. 2. 20. and 23; Spott. Prac. p. 306. and 168; Balf. 163. 165; Hope's M Prac. MSS; 3. St. 2. 3. 4; 3. Bank. 2. 1; Kilk. 541; Mack. Ob. James I. P. 2. c. 26; 2. Mack. Works, 487; 1571, c. 36. and c. 39; 1581, c. 101; 1587, c. 111; 1593, c. 180; 1594, c. 211; 1597, c. 235. 236. 237. 239; A. S. July 13. 1620; Feb. 29. 1692; Elliot *v.* Elliot, May 19. 1803, (15542);—(3.)—Turner, Nov. 17. 1807, (No. 16. App. Tailzie); Malcolm, Nov. 17. 1807, (No. 17. ib.); D. of Queensberry, Nov. 17. 1807, (No. 15. ib.); Turner, Dec. 6. 1811, (F. C.); Welsh, Nov. 12. 1812.

Respondent's Authorities.—(2.)—2. Mack. 487; 2. St. 3. 56; 3. Ersk. 8. 25; Young, Dec. 7. 1705, (15483); Redhaugh, March 11. 1707, (15489); Craig, June 13. 1712, (15494); Baillie, July 11. 1734, (15500); Primrose, Jan. 27. 1734, (15501); Hay, Feb. 9. 1758, (15602); Creditors of Hepburn, Feb. 1758, (15605, Aff.); Bryson, Jan. 22. 1760; (15511); Bruce, Jan. 15. 1799, (15539, Aff.); Craig, 340. § 12;

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* See Fac. Coll. Vol. 1812-1814, No. 166, where it is mentioned, that, 'On advising the case, the Lords were perfectly clear that there was no authority for saying 'that the word 'dispone' was equivalent to 'alienate,' and thus that the entail in 'question, which was otherwise silent on that point, did not strike against leases.'

Mar. 14. 1821. Hope's M. Prac. 406; 2. St. 3. 38; 3. Mack. 8. 17; 1. Bank. 587. § 149; 3. Ersk. 8. 29; Hepburn, Feb. 15. 1732, Aff.; Campbell, June 17. 1746, (15505); Sinclair, Nov. 9. 1749, (15383); Weir, Nov. 8. 1752, (4314); Nisbet, Nov. 1763, (15516); Case of Tillicoultry, Nov. 1763; Kemp, Jan. 17. 1769, (15528); Stewart, July 8. 1789; Brown, May 25. 1808, (No. 19. App. Tailzie);—(8.)—1449, c. 18; Lord Adv. March 30. 1762, (15196. Rev.); Jordanhill, Dec. 9. 1747, (Elchies' Notes, No. 32. Tailzie); Kilk. 395; 2. St. 9. 26.

J. RICHARDSON,—J. CHALMER,—Solicitors.

(*Ap. Ca. No.* 11.)

No. 6. Mrs. LINWOOD and Children, Appellants.—*Baird—Fullerton.* V. HATHORN, Respondent.—*Romilly—A. Bell.*

Reparation—Assythment.—A landed proprietor residing at a distance from his estate, held not liable in assythment to the widow and children of a person who was killed by the fall of a tree growing on his property, and which his servants were cutting without his orders.

Mar. 19. 1821. 1st DIVISION. Lord Craigie.

ON the 27th of November 1812, while John Linwood was riding along the highway from the Mull of Galloway to Stranraer in company with several other persons, he was killed by the fall of a tree. This tree was upon the estate of Gartland, belonging to Mr. Vans Hathorn, writer to the signet, who resided in Edinburgh. The road ran from north to south, and the tree was on the east side of it, with an inclination in the same direction. At the time when Linwood and his party were approaching on horseback, (which was about mid-day,) Matthew Graham was employed in cutting the tree, under the inspection of one Mackie, who was the servant of Mr. Hathorn. He had cut it in part with a hatchet on the east side, and when the party were passing, he was occupied in cutting it on the west side. At this moment, the tree, by the effect of the wind, which was blowing from the east, fell towards the west, across the road, upon Mr. Linwood, and bruised him so, that he expired within an hour thereafter. No precaution had been taken by ropes or otherwise to make the tree fall in any particular direction; but the operation was perceptible to all who were passing along the road, and it had been expected from the inclination of the tree, that it would have fallen towards the east, or from the road. Graham was indicted at the Ayr Circuit for culpable homicide, but was acquitted in consequence of a verdict of not guilty. Thereafter the widow of Linwood and his children brought an action against Mackie, Graham, and certain other persons alleged to have been directly concerned in

the cutting of the tree, and also against Mr. Hathorn, the proprietor of the estate, as responsible for these persons. Appearance was made for all the parties, but the litigation took place chiefly with Mr. Hathorn. In defence he stated, that although Mackie was his servant, yet Graham was not; that he had given no orders to cut the tree, and that Linwood's death had been occasioned by a casus fortuitus, for which no person could be responsible; and he pleaded, that even if it were established that any negligence was imputable to the persons who were cutting the tree, no responsibility could attach to him. Lord Craigie, after allowing a proof, and issuing a note in which he expressed an opinion that negligence was imputable, and that Mr. Hathorn was liable, reported the case on informations. In support of their claim against Mr. Hathorn, Mrs. Linwood and her children pleaded, that the death of Mr. Linwood had been occasioned in consequence of no precautions having been taken to prevent the tree from falling towards the road, and no notice being given that the operation was going on: That when a proprietor employs other persons under him to do his work, he is bound to select those who will do it properly, and use every possible precaution to prevent injury to third parties: That this is an implied contract, under which every man acts and possesses, and that his obligation to the public is not merely that he personally shall not commit injury, but that his acts of administration shall be so exercised, that injury shall not be sustained. To this it was answered, 1. That no blame or negligence was imputable to the persons cutting the tree, and consequently Mr. Hathorn could not be responsible for what was a pure accident; and, 2. That even supposing negligence were established, still he could not be made liable, because he neither knew of, nor authorized the cutting of this particular tree, nor of any other tree on his property; and if he had known of any design to do so, he would not have allowed it; that he gave no general discretionary permission or authority to cut down trees in his absence; and that he could not be made liable for the delict of his servants, by which the misfortune had been occasioned. The Court, by a majority, on the 19th of November 1816 and 14th of May 1817, assoilzied all the defenders.* Mrs. Linwood and her children having thereupon entered an appeal on the above grounds, the House of Lords 'Ordered and adjudged that the appeal be dismissed, and the 'interlocutors complained of affirmed.'

Mar. 19. 1821.

* See Fac. Coll. Vol. 1815-1819, No. 115.—Lords Justice-Clerk, Glenlee, and Robertson concurred in the judgment; Lords Bannatyne and Craigie dissented.

Mar. 19. 1821. *Appellant's Authorities.*—9. Dig. 3. 1; 1. Blackstone, c. 14. ad fin.; 1669, c. 16; Innes, Feb. 6. 1798, (13189); Black, Feb. 9. 1804, (13905); Brown. Feb. 25 1813, (F. C.); L. Keith, June 10. 1812, (F. C.); M'Manus, Nov. 26. 1800, (East's Rep.)

Respondent's Authorities.—9. Dig. 2. 30; 1. Bank. 2. 30; 1. St. 9. 5.

J. CHALMER,—SPOTTISWOODE and ROBERTSON,—Solicitors.

(*Ap. Ca. No.* 13.)

No. 7. DENNISTOUN, BUCHANAN, and COMPANY, Appellants.—*Sol.-Gen. Wedderburn—Romilly—Cranstoun.*
D. LILLIE and Others, Respondents.—*Wetherell—Denman.*

Insurance.—Held (affirming the judgment of the Court of Session,) that although it was innocently represented to insurers that a vessel was to sail from New Providence on the 1st of May, and a policy was thereupon executed; yet, as she actually sailed on the 23d of April preceding, and was captured on the 11th of May, this was a material misrepresentation to the effect of liberating the insurers.

April 5. 1821.
2D DIVISION.
Lord Pitmilly.

ON the 19th of March 1814, William Duff and Company, merchants at New Providence, addressed a letter to Dennistoun, Buchanan, and Company, merchants in Glasgow, in which they stated, that 'at a prize sale of a South Sea whaler, and her cargo 'of oil, that took place here yesterday, we purchased on your account about 40,000 gallons of spermaceti oil, at 3s. 9½d. sterling per gallon; 14,000 gallons of which we intend to ship upon 'that remarkable fast sailing schooner Brilliant of 157 tons burden, mounting six nine-pounders, to sail, with or without convoy, about the 1st of May, and on the value of which shipment 'you will please to make insurance;' and they ordered insurance on the Brilliant herself to Greenock for £1400. In another letter of the 24th, they mentioned that the Brilliant would be cleared out as bound to Greenock and a port on the continent. Copies of these letters (the originals of which had been transmitted, but not received) were inclosed in one of the 2d of April, in which it was stated, that 'the Brilliant will sail on the 1st of 'May, a running vessel, and in which the writer of this (one of 'the partners) will take his passage.' These letters were received by Dennistoun, Buchanan, and Company on the 17th of June thereafter, and on the following day they effected a policy of insurance with Lillie and others 'from Nassau to Clyde, with 'leave to call at all ports and places whatsoever for convoy, or for 'any other purpose whatever, without being deemed a deviation,

'and with or without letters of marque, leave to chase, capture, 'man, and convoy, or send into port or ports any vessel or vessels.' The insurance was done at the rate of six guineas per cent., to return three pounds per cent. 'for convoy for the voyage, or two 'pounds per cent. for partial convoy and arrival.' At that time this country was engaged in war with America; and, on the 23d of April, the Brilliant sailed under convoy of His Majesty's ship Martin for Halifax. She was captured on the 11th of May by an American privateer, and carried as a prize into Boston. Dennistoun, Buchanan, and Company having demanded implement of the policy from Lillie and others, and this being refused, they brought an action against them before the Court of Admiralty. In defence it was pleaded, that the nature and extent of the risk had been misrepresented; that it appeared from the letter of the 2d of April that the Brilliant was to sail on the 1st of May, whereas she had sailed on the 23d of April, which fact was material, because the vessel had thus been 56 days at sea instead of 49, as was supposed when the contract was entered into, and so would have been considered a missing ship; and that in this question it was unimportant that the misrepresentation was unintentional. To this it was answered, That there was no warranty as to the period when the vessel was to sail; that the letters had been exhibited, so that the insurers were put in possession of all the information which Dennistoun, Buchanan, and Company had obtained; and that these letters represented nothing more than that it was the intention of Duff and Company to dispatch the vessel on the 1st of May, without, however, fixing themselves down to that day, or preventing themselves from taking advantage of a convoy in the mean while. The Judge-Admiral, after alluding to the terms of the letters, found 'it admitted that these 'letters were communicated to the defenders, whereby they saw 'that the vessel was positively intended to remain in New Provi- 'dence, and not to sail therefrom till the 1st of May, and under 'this impression subscribed the policy in question; that the Bril- 'liant sailed on the 23d of April from New Providence, and, for 'any thing known, may have been captured before the 1st of 'May, when she was held forth to the defenders as remaining in 'the harbour; that although the representation made by the pur- 'suers was absolutely innocent on their part, the fact stated by 'them to the defenders was not verified, and a material change 'was thereby made in the risk undertaken by the latter;' and therefore assoilzied Lillie and others, and found them entitled to expenses. To this interlocutor he adhered, in respect 'that the 'risk which the underwriters undertook being confessedly that

April 5. 1821.

April 5. 1821. 'on a vessel to sail on the 1st of May, was perfectly different from 'one on a vessel which sailed on the 23d of April, inasmuch as 'the defenders undertook a risk on a vessel understood to be in 'the harbour and safe on the 1st of May, when, in fact, she had 'been eight days at sea.' He accompanied this interlocutor with a note, in which he observed, that 'the petitioners (D. B. and Co.) 'do not seem to dispute, that if the vessel had been taken before 'the 1st of May, they would have had no argument. They, 'however, state that the vessel was not captured till the 11th of 'May. This, in real reasoning, makes no difference, since it is 'a thousand chances to one, that if she had not sailed till the 1st 'of May, she would not have fallen in with the vessel which took 'her. The case of a vessel sailing the day before she is repre-'sented to sail, is quite different from that of a ship being de-'tained by unavoidable accidents beyond that day. In fact, it 'is an insurance on a vessel in jeopardy, when she is represented 'to be comparatively safe.' Dennistoun, Buchanan, and Company having brought these judgments under review of the Court of Session by reduction, Lord Pitmilly repelled the reasons, and assoilzied Lillie and others; and to this interlocutor the Court adhered on the 21st of May 1816, and 22d May 1817.*

Dennistoun, Buchanan, and Company then appealed; but the House of Lords 'Ordered and adjudged that the appeal be 'dismissed, and the interlocutors complained of affirmed.'

Appellants' Authorities.—Park, 321. 822; Marshall, 342; Park, 203, 205.

J. CAMPBELL,—C. BERRY,—Solicitors.

(*Ap. Ca. No.* 16.)

No. 8. Dr. JAMES R. BARCLAY, Appellant.—*Moncreiff—Keay.*
Right Hon. W. ADAM, Respondent.—*Clerk—Irvine—Cranstoun.*

Tailzie.—Held (affirming the judgment of the Court of Session,) that an entail, which inter alia prohibited sales, and thereafter all facts and deeds, civil or criminal, whereby the lands might be evicted, but in which the irritant clause mentioned only facts and deeds, without specifying sales or alienations, did not prevent the heir of entail in possession from selling.

May 18. 1821. 1ST DIVISION. Lord Gillies. ON the 11th of December 1804, the respondent executed an entail of the estate of Blair-Adam, in terms of a deed of entail made in 1758 by Alexander Littlejohn, and in pursuance of a statute of the 43d Geo. III. By the prohibitory clause it was

* Not reported.

declared, that 'it shall be noways lawful to the granter and heirs 'of entail to sell, alienate, or put away the lands and others fore-'said, or any part or portion thereof, nor to alter the course of 'succession above established, nor to contract debts above £500 'sterling at any one time, nor to do or commit any fact or deed, 'civil or criminal, whereby the said lands and estate, or any part 'thereof, may be any ways adjudged, evicted, or forfeited from 'me or them, or may be any ways affected, in prejudice and de-'fraud of the subsequent heirs of tailzie and provision succes-'sively, according to the order of substitution above specified; 'neither shall it be lawful for me or them to permit the said 'estate, or any part thereof, to be adjudged or affected for any 'debts or deeds contracted or committed by me or them before 'our succession, or by any of our predecessors whom I or they 'may any way represent, or to which, as their representatives, 'may be liable or subject to.' Then follows the irritant clause, in these terms: 'All which debts, deeds, and contrac-'tions, are hereby declared void and null, by way of exception 'or reply, and without declarator, in so far as they may burden 'the said lands and estate.' After this irritant clause, the prohibitive one is resumed in the following terms: 'Neither shall it 'be lawful for me or the said heirs of tailzie to permit the said 'lands and estate, or any part thereof, to be evicted, adjudged, 'or affected for any debts or deeds contracted or done by the 'said deceased Andrew Littlejohn, or for the said sum of £500 'sterling, wherewith the heirs of tailzie are empowered to burden 'the lands and estate at one time.' A resolutive clause then immediately follows, which is thus expressed: 'And if I or the 'heir in possession shall not redeem any adjudication that may 'be led against the said estate for and upon the debts and deeds 'of the said deceased Alexander Littlejohn, or for the said sum 'of £500 sterling, within three years of the expiry of the legal 'of such adjudications, then and in that case I or such heir shall, 'for himself only, lose and forfeit his right to the said lands 'and estate; and it shall be lawful to the next immediate heir 'of tailzie, and, if he shall neglect, to the next succeeding heir, 'and so on successively, to redeem the said adjudication, and use 'all the forms necessary in the order of redemption, and to enjoy 'and possess the said estate irredeemably thereafter, free of the 'debts and deeds of the preceding heir.' The entail afterwards contained a more comprehensive resolutive clause, which was in every respect applicable to alienations and the other acts specified in the prohibitory clause. In 1820, Dr. Barclay purchased from the respondent part of the estate at a price of upwards of

May 18. 1821.

May 18. 1821. £3000; but, being doubtful of the respondent's power to convey, he brought a suspension as of a threatened charge, on the ground that the respondent was, by the terms of the entail, effectually prohibited from selling any part of the estate. In support of this plea, he contended that as the entail, after prohibiting the heirs from doing certain deeds by which the right of the substitutes might be disappointed, contains an irritant clause, declaring in general terms that all these debts, 'deeds,' and contractions should be null and void, it was clear that all the particular acts previously specified (including that of selling) were comprehended under this sweeping declaration, and that there was no reason for denying effect to the general expression 'deeds,' because it was accompanied by other words of a more precise and limited import. To this it was answered, That although there was no doubt a prohibition against selling, yet the irritant clause was not a general one applicable to all the prohibitions, but was exclusively directed against those debts and deeds specified in the particular branch of the prohibitory clause immediately preceding it; that in this branch the heirs were prohibited 'to do or commit 'any fact or deed, civil or criminal, whereby the said lands and 'estate, or any part thereof, may be any ways adjudged, evicted, 'or forfeited;' and the irritant clause merely bears, that 'all which 'debts, deeds, and contractions are hereby declared void and 'null;' so that the term 'deed' here introduced referred to feudal delinquencies, and not to sales. The Court, on the 8th of February 1821, on the report of Lord Gillies, found the letters orderly proceeded, in respect 'that the deed of entail founded on 'by the suspender does not contain any irritant clause applicable 'to sales or alienations of the lands in the said tailzie.'* Dr. Barclay having appealed on the same grounds, the House of Lords 'Ordered and adjudged that the appeal be dismissed, and the 'interlocutor complained of affirmed.'

Respondent's Authorities. — Stewart, July 8. 1789, (15535); Brown, June 25. 1808, (No. 19. Ap. Tailzie.)

Appellant's Authorities.—Roxburghe entail; Tillicoultry entail.

J. CAMPBELL,—J. RICHARDSON,—Solicitors.

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* Not reported.

Mrs. BAILLIE, Appellant.—*Romilly—Clerk—Robinson.* No. 9.
General BAILLIE, Respondent.—*Cranstoun—Jeffrey—Fullerton—Cockburn.*

Divorce.—Held (affirming the judgment of the Court of Session,) that there were facts and circumstances proved against the appellant to establish adultery, and to infer decree of divorce.

May 22. 1821.
2D DIVISION.
Bill-Chamber.
Lord Reston.

THIS was an action of divorce, at the instance of General Baillie against his wife on the head of adultery, in which the sole question was, whether the fact alleged was proved? The Commissaries, having found it established, decerned in terms of the libel; and the Court of Session, on the report of the Lord Ordinary, refused a bill of advocation. Mrs. Baillie having appealed, the House of Lords 'Ordered and adjudged that the appeal be 'dismissed, and the interlocutors complained of affirmed.'

SPOTTISWOODE and ROBERTSON,—C. BERRY,—Solicitors.

(*Ap. Ca. No.* 21.)

J. GIBSON, Appellant.—*Romilly—Clerk—Thomson—W. Murray—J. A. Murray.* No. 10.
Sir WM. FORBES, Respondent.—*Gifford—Warren—Walker.*

Freehold Qualification—Jurisdiction.—Held (affirming the judgment of the Court of Session,) that it was not competent for a court of freeholders to entertain an objection, that the lands on which a claim for enrolment was made held burgage, and to verify which, it was necessary to revert to the titles anterior to those founded on by the claimant.

May 23. 1821.
2D DIVISION.

ON the 7th of December 1814, the Magistrates and Town Council of Edinburgh granted to Sir William Forbes a disposition of certain lands, and particularly of those of Greenhill, forming part of the Burrow or Common muir belonging to the City of Edinburgh. In virtue of the procuratory of resignation in this disposition, Sir William obtained a charter under the Great Seal from the Barons of Exchequer, the dispositive clause of which, so far as related to Greenhill, was in these terms: 'Totas et in-'tegras illas partes et portiones postea descript. terrarum vulgo 'vocat. the Burrow muir, alias the Common muir, ad civitatem 'Edinburgensem pertinen. viz. Totam et integram villam et terras 'de Greenhill,' &c. 'jacen. infra parochiam de St. Cuthberts, et

May 23. 1821. ‘ vicecomitatem de Edinburgh.’ In the quæquidem clause it was stated, ‘ Quæquidem totæ terræ aliaque supra disposit. perprius ‘ hereditariè personis postea mentionat. respectivè pertinuerunt, ‘ tent. per eos de nobis nostrisque regiis predecessoribus, immedi- ‘ atis legitimis earundem superioribus; viz. prædict. partes et ‘ portiones de lie the Burrow muir, seu Common muir, vocat. ‘ Greenhill, cum pertinen. ad Præpositum Magistratus et Muni- ‘ cipium dictæ civitatis de Edinburgh, pro usu communitatis dictæ ‘ civitatis, pertinuerunt; et per illos dicto Domino Gulielmo ‘ Forbes, Baronetto, ejus hæredibus et assignatis dispositæ fue- ‘ runt, secundum dispositionem, obligationem ad infeodandum per ‘ publicam tenuram, cum procuratoria resignationis continen., de ‘ data septimo die mensis Decembris millesimo octingentesimo ‘ decimo quarto.’

The tenendas clause was thus expressed: ‘ Tenend. et habend. ‘ dictas terras aliaque, cum pertinen. suprascript., per dict. Domi- ‘ num Gulielmum Forbes, ejusque prædict., de nobis nostrisque ‘ regiis successoribus, immediatis legitimis superioribus earundem, ‘ ut sequitur; viz. prædict. partes et portiones de lie the Burrow ‘ muir, seu Common muir, vocat. Greenhill, cum pertinentiis, in ‘ libera alba firma,’ &c.

The reddendo was in these terms: ‘ Reddendo inde annuatim ‘ dicto Domino Gulielmo Forbes, ejusque prædict., nobis nos- ‘ trisque regiis successoribus, immediatis superioribus earundem, ‘ respectivas divorias subsequen.; viz. pro dictis partibus et por- ‘ tionibus de lie the Burrow muir, seu Common muir, vocat. ‘ Greenhill, cum pertinen., summam unius denarii monetæ Scoticæ ‘ super fundum dict. terrarum de Greenhill, apud terminum ‘ Pentacostes annuatim, nomine albæ firmæ, si petatur tantum, ‘ cum talibus ulterioribus seu alteris divoriis (si tales sint) in ‘ cartis in favorem Præpositi Magistratuum et communitatis ‘ civitatis Edinburgensis content.’

Sir William Forbes, after being duly infeft, claimed to be enrolled as a freeholder of the county of Edinburgh; in support of which he produced the above charter, his sasine, and a certificate from the cess-books of the county, that the lands of Greenhill were valued at £103. 16s., and that the other lands conveyed to him made up the requisite valuation. Mr. Gibson, one of the freeholders, objected to the enrolment, on the ground that the lands of Greenhill held burgage, and that therefore Sir William had not the proper qualification. The freeholders having repelled the objection and enrolled Sir William, Mr. Gibson presented a petition and complaint to the Court of Session, praying to have Sir William's name expunged from the roll. To this Sir William ob-

jected that the complaint was incompetent, because, as he had produced a title ex facie good, and it was not possible to establish the allegation of the lands being burgage without going beyond the charter and reverting to the anterior rights, the freeholders could not listen to the objection. The Court having, on the 17th of May and 16th of December 1817, found 'the said complaint 'not competent,' and dismissed it,* Mr. Gibson appealed to the House of Lords, 1. Because the objection to Sir William's enrolment was of a nature that entitled the Court of freeholders, and the Court of Session as a court of review, to investigate and decide on its validity, even although the facts on which it is founded had not appeared ex facie of the title-deeds, seeing that it did not proceed on any allegation of a preferable right in a third party to the freehold estate claimed by Sir William, but on an allegation that no such freehold estate existed in the county of Edinburgh; and therefore they were bound to have inquired whether that fact was true, just as much as if it had been averred that the lands were locally situated in the county of Haddington, and not in that of Edinburgh; and, 2. Because the truth of the fact alleged in support of the objection to the validity of the freehold estate, viz. that it was burgage, was sufficiently apparent on the face of the titles produced by Sir William to the Court of freeholders to have warranted them in rejecting his claim, unless it had been established by better and further evidence. In support of this, he referred chiefly to the description of the lands, which showed that they were part of the Burgh muir, and belonged to the city of Edinburgh,—and to the reddendo, which consisted partly of burgage services. To these pleas Sir William answered, That the lands were described as lying within the parish of St. Cuthberts and county of Edinburgh,—were stated to be held blench of the Crown,—were valued in the cess-books, so that, ex facie the title was good,—and consequently the truth of the allegation that they held burgage could not be instructed without reverting to the anterior titles, which could not be competently done in the Court of freeholders. The House of Lords 'Ordered and adjudged that the appeal 'be dismissed, and the interlocutors complained of affirmed.'

May 23. 1821.

Appellant's Authorities.—Dunbar, Feb. 26. 1745, (8844, and Elch. No. 36. M. P.); Scott, Mar. 3. 1753, (8627); Campbell, Feb. 5. 1760, (7783, Aff.); Stewart, July

* See Fac. Coll. 1815-1819, No. 144, where it is stated that the Judges, with one exception, held that any inquiry into the nature of the holding in this shape was incompetent.

May 28. 1821.

28. 1761, (8579, Rev.); Abercromby, June 17. 1777, (No. 3. Ap. M. P.); Pirie, July 1777, (No. 4. ib.); Sibbald, Dec. 18. 1790, (8857); Carnegy, Feb. 26. 1796, (8858); Wight, 222; Bell on Elect. 238.

Respondent's Authorities.— Burn, Feb. 17. 1779, (8852); Adam, July 4. 1809, (F. C.) Kibble, June 16. 1814, (F. C.)

J. CAMPBELL,—SPOTTISWOODE and ROBERTSON,—Solicitors.

(*Ap. Ca. No. 22.*)

No. 11.

Sir WILLIAM FORBES, Appellant.—*Gifford—Warren—Walker.*
J. GIBSON, Respondent.—*Wetherell—Thomson—Grant—Fullerton—Murray.*

Process—Title to Pursue.—1. Whether an action of reduction of the titles of a freeholder, in order to found an objection to his enrolment, is competent after the lapse of the period specified in the 16th Geo. II. c. 11.—2. Whether a freeholder, merely as such, has a title to insist for reduction of the titles of another freeholder. Held in the affirmative by the Court of Session, but remitted for reconsideration.

May 23. 1821.

2D DIVISION. Lord Pitmilly.

AFTER the petition and complaint mentioned in the preceding case had been dismissed as incompetent, and more than four months had elapsed from the period of the enrolment of Sir William Forbes as a freeholder of the county of Edinburgh, in virtue of the titles there specified, Mr. Gibson brought an action of reduction, the summons in which was at his instance, as 'one of 'the freeholders electors of a commissioner to represent and 'serve in Parliament for the county of Edinburgh or Mid 'Lothian, and as such standing upon the roll of the said free-'holders, and so having a substantial interest to prevent all per-'sons not possessing the qualifications required by law from 'being enrolled on the said roll of freeholders.' After calling for production of the charter in favour of Sir William, and the instrument of sasine thereon, and libelling various grounds of reduction, the principal of which was, that the holding had been unwarrantably altered from burgage to blench, he concluded, that 'Therefore, and for other reasons to be proponed at dis-'cussing the said charter called for, with the signature and pre-'cept on which the same proceeded, and infeftment thereon, with 'all that has followed or may follow upon the same, ought and 'should be reduced, rescinded, retreated, cassed, annulled, de-'cerned and declared, by decree of our Lords of Council and 'Session, to have been from the beginning, to be now, and in all 'time coming, void and null, and of no avail, strength, or effect

'in judgment, and outwith the same, in time coming; and the 'said pursuer ought and should be reponed and restored there-'against in integrum.' In defence against this action, Sir William Forbes objected, 1. That as the period of four months allowed by the 16th Geo. II. c. 11. § 4, for bringing complaints against the enrolment of any freeholder, had expired,—as the avowed object of it was to prevent him from remaining on the roll, and as no alteration in his circumstances had occurred, the action was incompetent; and, 2. That as Mr. Gibson did not pretend that he had any right to the lands and others contained in the titles, and merely insisted in the character of a freeholder, he had no legitimate title or interest to pursue a reduction of the charter and infeftment, and still less to do so upon objections alleged to be deduced from the anterior progress of titles. To this it was answered, 1. That the statute limited merely the period within which it was competent to bring the judgment of the freeholders under the review of the Court in a summary form, but did not deprive a freeholder of his right at common law to obtain relief by an ordinary action, at any time, against the injury sustained by the undue admission of an unqualified person to the rolls; and, 2. That as every freeholder was intrusted by law with the guardianship of the purity of the roll, he was entitled to challenge and prevent every attempt to attach that right of admission (which the law limits to estates of a particular class and extent) to one defective in any requisite; that in one class of cases he had a right and title to do so in a summary form, but that there was another class, which, from demanding an investigation, could not be considered by the court of freeholders; that this, however, did not deprive any individual freeholder of his interest and title to obtain redress, and that it was of no importance that the effects of the reduction might be more extensive than his interest demanded. Lord Pitmilly 'having heard parties' procurators on the preliminary defence 'that the pursuer has no sufficient title to insist in the present 'action of reduction of the defender's charter and sasine, and 'having considered the process, and having seen the proceedings 'in the petition and complaint, and attended to the interlocutors 'of the Court by whom the complaint was dismissed as not 'competent, and having called the cause, repels the objection to 'the pursuer's title to insist in this action of reduction.' To this interlocutor he afterwards adhered, with this explanation, 'That 'the pursuer has a sufficient title to insist in the present action 'for reducing the defender's title, in so far as the pursuer is 'interested, as one of the freeholders standing on the roll of

May 23. 1821.

May 23. 1821. ‘ freeholders of the county of Mid Lothian, as libelled, to reduce ‘ the defender's said titles.’ The Court, after a hearing in presence, adhered, on the 19th of May 1820, to these interlocutors.* Sir William Forbes having entered an appeal on the grounds above stated, the House of Lords ‘ Ordered that the cause be re-‘ mitted back to the Court of Session to review the interlocutors ‘ appealed from generally, and especially having regard to the ‘ summons and the prayer thereof, and to what the Court, having ‘ such regard, can or cannot, according to law, further do in this ‘ cause.’

† After the appeal of Mr. Gibson against Sir William Forbes, under the summary application, had been debated and disposed of, the counter appeal of Sir William Forbes against Mr. Gibson, under the reduction, was proceeded in.

The *Attorney-General* (Gifford) began the opening for Sir William Forbes, the appellant.

The *Lord Chancellor* stated, that he saw that some of the Judges in the Court of Session lamented the extent of the conclusion of the summons: That it appeared to him that unless the respondent could, somehow or other, limit his conclusions to the enrolment of Sir William Forbes, he could never show that he had any interest to reduce the charter.

The *Attorney-General* urged, that if he could only have an interest to reduce the charter, so as to affect Sir William's enrolment, his objection ought to have been made within the four months; that, according to Erskine's account of the powers of the Court of Session, they did not appear, previous to the act 1681, to have had any jurisdiction in matters of this nature; and that therefore their power was derived from this and subsequent statutes only.

He then stated the terms of Mr. Gibson's summons of reduction.

Lord Chancellor.—You are perfectly right; the summons asks for a total reduction. The utmost that Mr. Gibson can get by this action, is, that the appellant shall be taken off the roll of freeholders. How he is to be taken off the roll by the Court of Session, does not yet appear. In these two cases between these parties, you have got us, as they say, into a clift stick. You have got a judgment in one cause, saying that the freeholders have no right to inquire; and, in the other cause, you say they ought to have inquired.

Attorney-General.—No; we say in the first cause, that we showed a primâ facie good title. In the second we say, that parties having an

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* See Fac. Coll. of that year, No. 37. No opinions of the Judges are given.

† These notes were laid before the Court of Session, on applying the remit. See Shaw and Dunlop's Cases, Vol. III. No. 120.

interest to reduce that title may do so; but that the freeholders have no such interest, and so have no right to reduce it. May 23. 1821.

Lord Chancellor.—It seems to me that, consistently with this judgment, a freeholder might succeed in reducing the title. The Judges put it in another way;—they say, suppose neither the Crown nor the city choose to interfere, then a wrong may be done without a remedy. The respondent says the lands are not in the county of Edinburgh.

Attorney-General.—This was not contended in the freeholders' court. All the decisions tend to show, that where the real owner of a freehold does not dispute the title of another to it, the freeholders cannot interfere.

Lord Chancellor.—I think the Judges must hold that they could, if they hold the doctrine contained in the interlocutor in this case.

Lord Redesdale.—In those cases cited, the question was, Whether the property belonged to A or B?—Here the question is, Whether it belongs to any one, as entitling him to vote as a freeholder of the county?

Lord Chancellor.—You may take it to be pretty clear, that we are of opinion that the freeholders could not inquire into this beyond the immediate title.

Lord Redesdale.—The assessment primâ facie shows that the lands are in the county. There comes to be another question, Whether the lands were of the proper tenure? And the question, Whether the charter could alter the tenure? and whether an additional voter could thus be introduced upon the county?

Attorney-General.—The summons asks for reduction of the charter. In no part of the summons does the pursuer ask to get the freeholder off the roll, which is in reality the only thing in which he has any interest. If the Barons have been deceived, they may reduce. The burgesses of Edinburgh, if they are aggrieved, may reduce. In the cases of reduction of decrees of valuation, a freeholder has an interest as an heritor.

Lord Redesdale.—His interest there lies the other way, except as a freeholder.

Attorney-General.—For aught that appears in the summons, it does not appear that Sir William Forbes ever was enrolled. In the very next case, (that of Arbuthnot,) the Court of Session holds that they cannot reduce as against a freeholder not enrolled. In the summons, it does not appear that the pursuer has an interest as against an enrolled freeholder. Our argument in the Court of Session might have been, You may reduce as to our enrolment, but not as to the title itself.

Lord Chancellor.—All the Judges considered this as a case of difficulty, but that the party would be without a remedy if not entitled to pursue this action. Lord Robertson appears to have overlooked the

May 23. 1821. form of the summons. You cannot, in a summons which does not state the grievances really to be complained of, give any remedy.

Attorney-General.—The Lord Justice-Clerk seems also to mistake one point. The complaint really meant to be made here is precisely of the same species as those in the act of Parliament. These two appeals must be considered separately.

Lord Chancellor.—The Court of Session having given leave to appeal before the conclusion of the cause, shows that they thought themselves competent to have given some final judgment in it. It has struck me strongly that this is a case which we must remit, as we are bound to suppose, that notwithstanding the form of the summons, some judgment can ultimately be given.

Mr. Grant.—We will show your Lordships what judgment might be given under this summons.

Lord Chancellor.—But then we should have to give an opinion as to what the final interlocutor of the Court of Session may be, before the Court itself shall have decided.

Attorney-General.—We asked leave to appeal, on the ground that under this summons no freeholder is, merely as such, entitled to pursue. I say that the prayer of the summons should have been, that the enrolment should be reduced.

Lord Chancellor.—I suppose they will say the charter should be reduced so far as it gives a right of voting, and that then, at the next Michaelmas Court, the appellant, from a change of circumstances, could be put off the roll.

Attorney-General.—But for this purpose they must reduce the tenure.

The Attorney-General then concluded.

Mr. Wetherell, for the appellant.—I will take notice of a fallacy on which the respondent argues. He holds the right of voting to be a part of the subject. The right to vote is a consequence of the tenure itself,—nothing entering into the corpus of the freehold—only growing out of it, and stands pari passu with a right to vote for a freehold in England. This is an action to destroy in toto the grant.

Lord Chancellor.—The inclination of the House is to remit to the Court of Session to consider the terms of the summons, and to find what remedy the Court of Session is entitled to give under it, supposing the judgment now appealed from to stand.

Mr. Grant.—A pursuer is entitled to limit the conclusions of his summons as much as he pleases, and the Court is also entitled to limit them for him.

Lord Chancellor.—Whether the pursuer restrict, or the Court restrict, we must, if we proceed, now decide what that restriction must be, without the Court of Session having decided for us.

Lord Redesdale.—Does not the competency or incompetency of the

action depend upon what the Court can do? If the Court can do nothing, the freeholder cannot sue. May 23. 1821.

Lord Chancellor.—We have not here in discussion what the Court can do.

Mr. Grant.—In the parallel case of a reduction of a decree of valuation, the question has always been, Whether the freeholder had a legal interest to pursue? This interest might be various—disturbing the mode of taxation, &c. There never was a question in such actions, that a person, as a freeholder merely, had no title to pursue.—Mr. Grant read the terms of the summons.

Lord Chancellor.—You are to restrict, then, the generality of the prayer by the specialty of a recital.

Lord Redesdale.—How can there be a competency to sue, if nothing can be done under the action?

Lord Chancellor.—I give no opinion as to whether any thing can be done or not under this summons, but we must use great caution in cases from Scotland, and particularly in cases like this, how we proceed in point of form. We should have first had from the Court itself its opinion what it could have done ultimately under the summons. I should have wished the final decree to be pronounced before the appeal came here.

Appellant's Authorities.—(1.)—1457, c. 75; 1503, c. 78; 1587, c. 114; 1681, c. 21; 16. Geo. II. c. 11; 1. Wight, 338.—(2.)—Lord Galloway, Feb. 10. 1681, (7835); Colt, &c., Jan. 9. 1756, (7782.)

Respondent's Authorities.—(1.)—Bell on Elect. p. 402, and cases there.—(2.)—Wight, 185; Earl of Fife, July 8. 1774, (8850.)

SPOTTISWOODE and ROBERTSON,—J. CAMPBELL,—Solicitors.

(*Ap. Ca. No. 23.*)

WILLIAM ARBUTHNOT, Appellant.—*Gifford—Cranstoun—L'Amy—Walker.* No. 12.

JAMES GIBSON, Respondent.—*Thomson—Fullerton—Murray.*

Title to Pursue.—1. Whether it is competent for a freeholder, merely qua such, to insist in a reduction of the titles of a party who has not actually claimed to be enrolled, but has made up titles with that view? And, 2. Whether, if it is not, the objection to the title to insist in that action can be removed by the defender being enrolled pending the process? The Court of Session having found in the *negative* on the first point, and in the *affirmative* on the second, case remitted for reconsideration.

MR. ARBUTHNOT having acquired from the Magistrates of Edinburgh an assignation to a charter, under the Great Seal, of certain lands in a situation similar to those which had been con- May 23. 1821.

2D DIVISION. Lord Pitmilly.

May 23. 1821. veyed to Sir William Forbes, as mentioned in the two preceding cases, he was infeft on the 24th of July 1816. On the 18th of December 1817, and before Mr. Arbuthnot had claimed to be enrolled as a freeholder of the county of Edinburgh, Mr. Gibson raised an action of reduction of his titles, in the same character, and on the same grounds, and having the same conclusions, as in the case of Sir William Forbes. In defence, Mr. Arbuthnot pleaded, 1. That as he was not enrolled as a freeholder, Mr. Gibson had neither interest nor title to insist in the reduction; and, 2. That even although he were enrolled, still Mr. Gibson could have no valid title to pursue a reduction. Lord Pitmilly sustained the former of these objections, and dismissed the action; and observed, in a note, that 'a difficulty certainly arises in this case, from the decisions sustaining the title of freeholders to reduce a division of valuation, when the party has not been admitted on the roll, and that difficulty has not been taken notice of by the defender; but still the Lord Ordinary thinks, that the decision in the case of the Earl of Fife *v.* Gordon, 8th July 1774, and the principle upon which that case was decided, ought to regulate the present case. The point now under discussion does not appear to have been argued in the cases referred to, in which the title to reduce divisions of valuations was sustained.' Thereafter Mr. Arbuthnot claimed to be admitted on the roll of freeholders, and was enrolled accordingly. On this change of circumstances being brought under the consideration of the Lord Ordinary, he pronounced this interlocutor: 'In respect the defender has, since the date of the Lord Ordinary's last interlocutor, claimed enrolment on the roll of freeholders, and has been enrolled in virtue of the titles which have been brought under reduction by the pursuer, alters the interlocutor reclaimed against, and sustains the pursuer's title to insist in the present action for reducing the defender's said titles, so far as the pursuer is interested as one of the freeholders standing upon the roll of freeholders of the county of Mid Lothian, as libelled, to reduce the defender's said titles.' To this interlocutor the Court, on the 19th of May 1820, adhered. Mr. Arbuthnot having entered an appeal, the House of Lords 'Ordered that the cause be remitted back to the Court of Session, to review the interlocutors appealed from generally, and especially having regard to the summons and the prayer thereof, and to what the Court, having such regard, can or cannot, according to law, further do in this cause; and having also especial regard to the period at which the appellant was enrolled in the roll of freeholders.'

SPOTTISWOODE and ROBERTSON,—J. CAMPBELL,—Solicitors.

(*Ap. Ca. No.* 24.)

S. STIRLING and Others, Trustees of the late JOHN M'KENZIE, Appellants.—*Romilly—Rutherfurd.*

R. FORRESTER, for the Bank of Scotland, Respondent.—*Cockburn—Walker.*

No. 13.

Cautioner.—Four parties having guaranteed payment of bills to the extent of £8000, by four separate bills, each for £2000, and one of the original bills, and also one of the security bills, having been given up by the creditor, and another received in substitution thereof, held (reversing the judgment of the Court of Session,) that one of the cautioners, whose consent was not obtained to this transaction, was quoad hoc discharged.

June 13. 1821.

1ST DIVISION.

Lord Alloway.

JAMES and GEORGE SPENCE, manufacturers in Dunfermline, were in the practice of lodging with their banker, Mr. Paterson of Edinburgh, the bills which they obtained, at long dates, from their customers; and Paterson and his agents, in consideration thereof, accepted bills at short dates, drawn on them by the Messrs. Spence. In the early part of the year 1810, Paterson and his agents in London,—Robertson and Stein, and Todd and Company,—having accepted bills to the extent of £8200, the Messrs. Spence discounted them with Hunt, the agent for the Bank of Scotland in Dunfermline. This person, as well as his cautioners, were responsible to the Bank of Scotland for all the bills which he discounted. Before the bills fell due, Paterson and his agents, viz. Robertson and Stein, and Todd and Company, became bankrupt, and the Messrs. Spence thereupon applied to the Bank of Scotland to delay enforcing payment. An arrangement was accordingly entered into, by which it was agreed that the Messrs. Spence should accept four several bills, payable 18 months after date, for £2000 each;—that John M'Kenzie, David Beatson, William Haig, and John Spence, should each indorse one of the bills, so as to be liable to the extent of only £2000 each. The nature of the transaction was thus explained by Mr. Sandy in an official letter from the Bank: 'On the 1st 'of December 1810, James and George Spence, manufacturers 'in Dunfermline, granted their promissory note to the late John 'M'Kenzie, Esq. of Garnkirk, payable at 18 months after date, for '£2000, which was indorsed by him and Mr. Charles Hunt, then 'agent for the Bank of Scotland in Dunfermline; and was, with 'three similar notes of the same date and currency, one payable 'to Mr. William Haig, bleacher at Dollar, another to John 'Spence, surgeon, Royal Navy, and a third to David Beatson, 'Esq. of Micklebeth, merchant, Dunfermline, each for £2000,

June 18. 1821. ‘ lodged with the Bank of Scotland, as a collateral security to the ‘ Bank of certain bills discounted to James and George Spence ‘ at the Bank's office at Dunfermline, through the official inter- ‘ vention of Mr. Charles Hunt, while the Bank's agent there, ‘ amounting of principal to £8200.’

On the 27th of April 1812, and before the bills became due, but after some partial payments had been made by the Messrs. Spence, they applied to the Bank of Scotland to deliver up the original bill granted by Robertson and Stein, amounting to £2300, and also the collateral bill for £2000, which had been indorsed by John Spence, and to receive in place thereof the promissory note of the Messrs. Spence for £1997 : 4 : 2, payable three months thereafter, and indorsed by John Spence and Charles Hunt to the bank. In reference to this proposal, the secretary answered, that ‘ The directors have ordered your pro- ‘ missory note to Mr. John Spence, 27th April, at three months ‘ date, for £1997 : 4 : 2, to be discounted and applied in pay- ‘ ment of your bills on Messrs. Robertson and Stein, and that ‘ the said bills be given up along with Mr. John Spence's corro- ‘ boratory bill for £2000.’ This was accordingly done, but it did not appear that any communication had been made to MacKenzie on this subject. By this time Hunt had been removed from his office, and his cautioners were thereby discharged of any responsibility for his future obligations. In the month of May 1812, the Messrs. Spence applied to M'Kenzie to consent to the renewal of his bill; but being at that time on deathbed, his daughter, in answer, addressed a letter to Mr. Pearson, the agent of her father, in which she said, ‘ My father has received ‘ two letters from Mr. George Spence, in which he says he would ‘ pay you the annuity about the 15th instant. When you inform ‘ him you have the receipt, be so good as say, my father will ac- ‘ cept the £2000 bill when he sends it.’ M'Kenzie died a few days thereafter, without any thing farther being done; and when the bill for which he was liable fell due on the 4th of June, it was protested against all concerned. Payments were afterwards recovered indefinitely from Paterson and his agents, and from the Messrs. Spence, which reduced the original debt of £8200 to £4844. 15s. An action having been brought against the appellants, as trustees of M'Kenzie, for payment of the bill of £2000, they pleaded in defence, that the true nature of the obligation of Mr. M'Kenzie was, that he was to be a cautioner along with Beatson, Haig, and John Spence, for the original debt of £8200, but that his liability was to be limited to £2000; that the bank was to receive payment from the Messrs. Spence from time to time, and to draw

dividends from the three estates of Paterson, Robertson and Stein, and Todd and Company, on the original bills, and to apply them in reduction of the total debt,—the cautioners being liable rateably and proportionally for the eventual balance; that, notwithstanding, the bank had, without the consent of M'Kenzie, delivered up the bill of Robertson and Stein, for which both Hunt and his cautioners were responsible, and also the collateral bill of John Spence, and had received in substitution thereof a new bill postponing the term of payment, and for which the cautioners of Hunt could not be made liable. They therefore contended, that the obligation of M'Kenzie had been discharged. To this it was answered, 1. That the bill on which the action was founded was unqualified by any condition, and did not bear reference to any cautionary obligation undertaken along with others; that when the bank took this bill and the others above mentioned, they considered each to be a separate and independent obligation, and that they were entitled to transact with each of the obligants as they thought proper; and, 2. That it was proved by Miss M'Kenzie's letter, that her father had consented to the renewal; and, at all events, the bills which had been delivered up had been returned, the object of giving them having been to enable the Messrs. Spence to recover the dividends due by the estate of Robertson and Stein; and the trustees of M'Kenzie might have brought matters to a close when the bill due by him was protested. Lord Alloway found, 'That this action proceeds on a 'bill granted to the late Mr. M'Kenzie by Messrs. Spence, and 'discounted by Mr. Hunt, as agent of the Bank of Scotland at 'Dunfermline: That this bill was indorsed by Mr. M'Kenzie, 'together with other three bills, by Mr. Haig, by Mr. Beatson, 'and by Mr. John Spence, for £2000 each, in order to operate 'to the Bank of Scotland as a security for a sum exceeding '£8000, in which Messrs. Spence then stood indebted to the 'bank, arising from the returned bills of David Paterson, Ro'bertson and Stein, and Todd and Company, which Messrs. 'Spence had negotiated with the bank: That when the bills in'dorsed by Mr. M'Kenzie and the other three gentlemen became 'due, although Mr. M'Kenzie was not a joint obligant for the '£8000, and could only be liable for his separate obligation for '£2000, yet, as it appears from Mr. Sandy's letter that the bank 'were well acquainted with the nature of the transaction, and 'that these four obligants had merely interposed their security for 'Messrs. Spence to the amount of £2000 each, in relief of £8000 'due by the Spences to the bank, so the bank could only have pro'ceeded against them by giving them a proportional and equit-

June 13, 1821.

June 13. 1821. ‘ able relief of the debts which they had been able to recover from ‘ the original obligants: That although it is alleged that the ‘ bank had given up to Messrs. Spence the bills which they held ‘ of Robertson and Stein, which formed part of the £8000, yet ‘ this was done merely for the purpose of drawing the dividend ‘ from Robertson and Stein; and this being done, these bills were ‘ again restored to the bank, and credit is given in the accounts ‘ exhibited by the bank for the dividends so drawn: That when ‘ the four bills for £2000 each became due, Messrs. Spence had ‘ applied to their friends and to the bank for a renewal of the ‘ same for three months; and that it is instructed by Miss Mac- ‘ Kenzie's letter, written by her father's order, that he had also ‘ agreed to renew his obligation for three months; and Mr. Haig, ‘ Mr. Beatson, and Mr. John Spence having also assented to a ‘ renewal of their obligation, new bills upon their part were dis- ‘ counted; but Mr. M'Kenzie having died after the bill had been ‘ sent to him to be signed, his bill was not renewed, but the for- ‘ mer bill was protested, and duly intimated to his representa- ‘ tives: That, in these circumstances, the renewal of the other ‘ three bills, and Mr. M'Kenzie having previously assented to a ‘ renewal, cannot entitle his representatives to be relieved of the ‘ payment of his bill: That the intimation to his representatives ‘ of the dishonour of the bill, upon which Mr. M'Kenzie stood ‘ bound, put it in their power to have brought the matter to a ‘ close, and to have insisted that the bank should immediately ‘ close the account, and receive their proportion of the loss, cor- ‘ responding to Mr. M'Kenzie's obligation of £2000, but so as ‘ not to exceed that sum: That nothing has been stated upon ‘ the part of the defenders, to show that the bank had attempted ‘ to give any of the obligants the least preference over the rest; ‘ and as it is not disputed that the balance due to the bank still ‘ greatly exceeds the sum of £2000 contained in the promissory ‘ note indorsed by Mr. M'Kenzie, after giving credit for all the ‘ sums which they have been enabled to recover from the other ‘ obligants, decerns against the defenders, as Mr. M'Kenzie's re- ‘ presentatives, for payment of the sum contained in the said pro- ‘ missory note, with interest thereon since the same became due.’ To this interlocutor the Court adhered on the 4th of July and 28th of November 1816, by refusing petitions by both parties, without answers.*

Mutual appeals having been entered, the House of Lords pronounced this interlocutor: ‘ The Lords find that the Governor

* Not reported.

'and Company of the Bank of Scotland having accepted the promissory note of James and George Spence to John Spence, and indorsed by him and Charles Hunt, in substitution for the balance due on the bills in the proceedings mentioned, drawn by James and George Spence on, and accepted by Robertson and Stein, are not entitled to make any demand against the estate of John M'Kenzie, deceased, upon the indorsement of the said John M'Kenzie on the promissory note of James and George Spence, dated the 1st December 1810, in the proceedings mentioned, in respect of the said bills drawn by James and George Spence on, and accepted by Robertson and Stein: And the Lords further find, that, under the circumstances of this case, the Governor and Company are entitled to demand against the estate of the said John M'Kenzie, on the said promissory note of the 1st December 1810, one fourth part only of the balance which shall appear to be due to the said Governor and Company from the said James and George Spence, in respect of the several bills drawn by the said James and George Spence on, and accepted by David Paterson and Todd and Company, in the proceedings mentioned, after giving credit for all the sums of money received by the said Governor and Company, or which might have been received by them from all or any of the parties to such bills respectively, or their respective estates, towards discharge of the debts due to the said Governor and Company upon such bills: And it is therefore ordered and adjudged, that the several interlocutors complained of in the said original appeal, so far as they are inconsistent with these findings, be reversed: And it is further ordered, that the cause be remitted back to the Court of Session, to ascertain the balance due from the estate of the said John M'Kenzie to the said Governor and Company, according to such findings: And the Lords further find, that upon payment of such fourth part of such balance, the said Governor and Company are bound to answer to the estate of the said John M'Kenzie one fourth part of any future dividends which, after the adjustment of the said account between the said Governor and Company and the estate of the said John M'Kenzie, according to the findings foresaid, may become payable to the said Governor and Company from the several parties to the said bills drawn by James and George Spence on, and accepted by David Paterson and Todd and Company, in respect of such bills respectively: And it is further ordered and adjudged, that the said cross appeal be dismissed, and that the said interlocutors, so far as they are therein complained of, be affirmed.'

June 13. 1821.

June 13. 1821. *Respondent's Authorities.*—(1.)—3. Ersk. 2. 31;—(2.)—3. Ersk. 3. 66; 1. Bank. 23. 44.

SPOTTISWOODE and ROBERTSON,—J. CHALMER,—Solicitors.

(*Ap. Ca. No.* 26.)

No. 14. A. WALLACE, for the Glasgow Glass-Work Company, Appellant. —*Leach—Cuninghame.*
J. GEDDES, Respondent.—*Warren—Forsyth.*

Interest—Expenses.—Held,—1.—(reversing the judgment of the Court of Session,) That interest on a salary, of the amount of which there was no evidence, was not due prior to constitution by decree; and,—2.—That expenses, in the circumstances, were not due to either party.

June 13. 1821.
1ST DIVISION.
Lord Craig.

IN 1795 Geddes brought an action against the Glasgow Glass-work Company, alleging that he had been employed by them as their manager at a salary of £275 per annum, besides being entitled to a share as a partner; that they had failed to pay him his salary, except certain small sums which he had received for his subsistence, and concluding against them for £1790, being the arrears which were due to him. The case then resolved into a count and reckoning, and only two questions of any general importance arose,—the first relating to a claim of interest by Geddes, and the other to the expenses of process. The Lord Ordinary, on the 13th of November 1798, after finding that no specific sum of salary had been agreed upon, found Geddes entitled to £120 per annum. This interlocutor was recalled by the Inner-House on the 13th of December 1799, by whom it was fixed at £226. 18s. 5½d. per annum; and by a subsequent interlocutor of the 2d of June 1801, they found Wallace 'liable in the full expense 'of extract,' without mentioning any other expenses. These judgments were affirmed simpliciter by the House of Lords on the 26th of February 1805, without any allusion to costs. The case then returned to the Court of Session, to make up a state of accounts between the parties. On the 13th of May 1806, the Lord Ordinary found 'that an interest account must be stated 'between the parties, giving each of them interest on the sums 'they shall appear to be in advance.' Thereafter, on the 3d of March 1808, his Lordship, on advising the report of an accountant, and objections by Geddes, found 'that interest must be 'stated on the salary due to Mr. Geddes, at the rate of 5 per 'cent., from the end of each year.' This interlocutor was ad-

hered to by the Court on the 24th of February and 11th March 1809. After several intermediate proceedings and reports of an accountant, the Court, on the 9th June 1813, found that 'payments or advances made to Mr. Geddes from the funds of the 'company are to be applied towards extinction of advances made 'by Mr. Geddes for the company, and salaries due to him by 'them, with the interest thereof, and towards extinction of such 'interest in the first place, and of such advances and salaries in 'the second place, and that the surplus, if any, after computation as aforesaid, shall not bear interest against Mr. Geddes till 'the end of a year from the date of the payment or advance.' A balance having been ascertained on these principles in favour of Geddes, the Court, on the 14th of December 1814, decerned for the same. A question then arose as to the expenses of process, in reference to which Wallace contended, that the Court could not competently award any expenses to Geddes prior to the interlocutor of the House of Lords affirming those of the Court of Session, in which the expenses decerned for were limited to those of extract, and that, in the circumstances, no expenses were due. The Court, however, on the 16th of May 1815, found 'that the article relative to the expense of extract, in the interlocutor of 2d June 1801, was inapplicable to the circumstances 'of the case and the state of the process as at that time, and must 'have been inserted per incuriam; and that the Court are not 'therefore barred thereby from awarding to Mr. Geddes the 'whole expenses of litigation incurred before the action of appeal,' and found expenses due accordingly, and remitted to the auditor to tax the amount. The auditor having rejected a claim made by Geddes for journeys to Edinburgh, the Court, on objections being lodged, found Geddes entitled to £200 on this account, in addition to the taxed expenses, in respect that these journeys 'were necessary and useful in the circumstances of this case.' *

June 13. 1821.

Wallace then appealed, on the ground, 1. That as there had been no fixed salary, interest ought not to have been allowed prior to the date of its constitution by the decree of the Court; and, 2. That it was incompetent to award any expenses except those of extract prior to the judgment of the House of Lords, and that no expenses of any part of the litigation were due. To this it was answered, 1. That the decree of the Court did not create the debt, but merely repelled the unfounded objections made by Wallace, and gave effect to it, so that interest ought to be allowed; and, 2. That expenses were in the circumstances due, and

* Not reported.

June 13. 1821. justice could not be excluded by a limited finding, which was evidently introduced per incuriam. The House of Lords 'Ordered and adjudged, that the interlocutors complained of, so far 'as they allow to the respondent interest on the enlarged salary 'of £226: 18: 5, before the same was constituted by the interlocutor of the 13th December 1799, and so far as the same relate 'to the costs of suit, and the allowance to the respondent of '£200 sterling, in addition to the taxed amount of costs reported by the auditor, be reversed: And it is declared, that, under 'the circumstances of this case, neither party is entitled to costs 'of suit hitherto: And it is further ordered and adjudged, that 'the rest of the interlocutors be affirmed: And it is further ordered, that the cause be remitted back to the Court of Session, 'to do thereupon as shall be just.'

A. MUNDELL,—J. CHALMER,—Solicitors.

(*Ap. Ca. No. 27.*)

No. 15. EARL of ELGIN, Appellant.—*Romilly—Erskine—Bell.*
ROBERT WELLWOOD, Respondent.—*Clerk—Moncreiff.*

Entail.—Held (affirming the judgment of the Court of Session,) that a lease of 999 years, with a grassum, did not fall under the prohibitions in an entail against alienating, there being a permissive clause to let leases on certain terms, without limitation in point of endurance, and the lease being so granted.

June 18. 1821. 1st DIVISION. Lord Armadale. BY the entail of the estate of Garvoch, executed by the father of the respondent in 1790, there is a prohibition, fortified by irritant and resolutive clauses, against selling, alienating, or disponing the lands; and it is declared, that the heirs shall not 'set 'tacks or rentals of any part of the said lands and estate, except'ing in the terms after mentioned, for longer space than nineteen 'years certain, or for the life of the setters, or in the terms of the 'powers given to the proprietors of entailed estates in Scotland 'anent granting of tacks or leases, by an act of Parliament passed 'in the tenth year of his present Majesty's reign.' The exception alluded to is thus expressed: 'And with this power and faculty, 'as it is hereby expressly provided and declared, notwithstanding 'of the restrictions before written with regard to the setting tacks, 'that the said Robert Wellwood, my son, and each of the heirs 'succeeding to the said lands and estate, shall have full power to 'set tacks of the same, excepting the house, office-houses and gar-

'dens of Pitliver, and 100 acres of ground most adjacent and 'contiguous to the said manor-place, for such space of time as 'they shall think fit, provided that the same shall never be set at 'a smaller yearly rent than three bolls of oatmeal, at eight stone 'weight per boll, for each acre so to be set, and proportionally 'for any smaller quantity; and which rent or tack-duty shall al- 'ways be payable in kind, and never be converted into money: 'Declaring, that in case the said Robert Wellwood, my son, or 'any of the said heirs of tailzie, shall set tacks of the said estate, 'or any part thereof, for any longer space than nineteen years, or 'in terms of the act of Parliament before mentioned, except in 'the terms of the clause immediately before written, then shall 'not only such tacks be in themselves void and null, but also the 'persons granting the same shall, for himself or herself alone, 'forfeit their right to the said tailzied lands and estate, and the 'same shall ipso facto fall and devolve to the next heir called to 'the succession as aforesaid, free of such tacks, and in the same 'way and manner as is provided in the other cases of contraven- 'tion.' June 13. 1821.

On the 9th of October 1807 Lord Elgin, through the medium of his agent, addressed a letter to the respondent Mr. Wellwood, the heir in possession, by which he offered to enter into a missive of lease of part of the estate for 999 years, declaring, that 'the 'rent is to be three bolls of oatmeal per acre, besides a grassum 'of £12,000 sterling, bearing interest from Martinmas next, but 'the grassum not to be payable during your lifetime. It is un- 'derstood that Lord Elgin is in the mean time to find security for 'that sum to the satisfaction of Mr. Thomas Adair, writer to the 'signet; and also, that if the lands before mentioned, to be con- 'tained in the lease, do not amount to 200 acres Scots measure, 'you are to include in it as much more land from the west side 'of the farm of Munschilloch as will make up that extent. It is 'further understood that, by your acceptance of this offer, you 'agree to enter into a lease with Lord Elgin, for the same period 'of years, at the same rent, and for a grassum in proportion to 'the extent, to be fixed according to the grassum now offered, of 'all the land lying to the west of Pitliver house, and belonging 'to you, which you are at liberty to let for that period of years, 'in terms of the entail of your estate; but this only in case his 'Lordship should incline to enter into such a lease. And it is 'further agreed that, at all events, the grassum shall not be pay- 'able for five years from next Martinmas.' This offer was ac- cepted by Mr. Wellwood, and he alleged that afterwards a trans- action took place, by which the quantity of land lying to the west

June 18. 1821. of Pitliver house, and referred to in the above missive, was marked off and ascertained.

Lord Elgin having delayed to enter into the lease, Mr. Wellwood brought an action against him, concluding for implement of the missive. A counter action of declarator and reduction was brought by Lord Elgin against Mr. Wellwood and the other heirs, in which, after founding on the terms of the entail, he concluded that it ought to be found and declared, 'That, under these 'general prohibitions, the said Robert Wellwood was effectually 'prohibited and debarred from granting a lease for 999 years of 'so considerable a part of the said entailed lands and estate as '248 acres and 658 parts of an acre; such lease being in truth 'and substance an alienation of the said land, and a deed whereby 'the same will be evicted from the heirs called to the succes-'sion after the said Robert Wellwood, and not being any or-'dinary tack or lease, such as even an unlimited proprietor, 'having no intention to alienate, would grant in the administra-'tion of his estate, nor a deed in exercise or within a fair and 'true meaning of the powers granted to heirs with respect to the 'setting of tacks or leases,' the above missive ought to be reduced and set aside. Lord Armadale decerned in terms of the conclusions of the action of implement at the instance of Mr. Wellwood; and this judgment having been brought under the review of the Inner-House, he reported the action of declarator and reduction which had been subsequently raised. By Lord Elgin it was maintained, 1. That although he was ready to fulfil the bargain, provided he were in safety so to do, yet, as doubts had recently begun to prevail as to the validity of such a transaction,—that as it had been settled by the cases of the Duke of Queensberry against the Earl of Wemyss, Turner against Turner, and Malcolm against Henderson, that leases beyond the ordinary endurance were alienations,—it was clear (abstracting from the permissive clause) that the lease in question was an alienation, and as such prohibited by the entail; that the permissive clause could not be extended so as to entitle an heir to make an alienation of the dominium utile for 999 years, because it had reference exclusively to contracts of leases limited for those periods of years which in law did not extend to an alienation; and, 2. That, supposing the missive to be binding, no arrangement had been completed with regard to the lands to the west of Pitliver house.—To this it was answered, 1. That the power contained in the permissive clause to set tacks for such space of time as the heirs of entail should think fit, was sufficient to authorize the contract, whatever might be the interpretation of the prohibitory clause;

and, 2. That there was satisfactory evidence that the arrangement as to the quantity of additional land had been completed. The Court, on the 11th of March 1810, after conjoining the two actions, found and declared in the process of declarator, 'That the 'missive of lease granted by Mr. Robert Wellwood to the pur- 'suer is a valid and effectual right to the pursuer, both against 'the granter and the other defenders and substitute heirs of en- 'tail;' and in the action of implement adhered to the Lord Ordinary's interlocutor.* June 18. 1821.

In terms of these judgments, Lord Elgin subscribed a contract of lease, granted an heritable bond for the grassum, and paid the rents and interest for some years. Conceiving, however, from the decision in the House of Lords in the case of the Queensberry leases, and of Henderson against Malcolm, that a lease of so long endurance, accompanied with so large a grassum, was not valid, he entered an appeal on the grounds above stated. The respondent, in addition to his answers formerly made, contended, 1. That Lord Elgin was barred personali exceptione from entering the appeal, because he had confirmed and homologated the transaction, and the decree of the Court by which it was found to be binding; and, 2. That the grassum was not with diminution of the rental, because the precise rent required by the entail had been stipulated; and so far from being prejudicial to the heirs-substitute, it was beneficial, seeing that it was impossible to get a higher rent than that which Lord Elgin was bound to pay. The House of Lords 'Ordered and adjudged that the appeal be dismissed, and 'the interlocutors complained of affirmed.'

J. Chalmer,—J. Richardson,—Solicitors.

(*Ap. Ca. No.* 28.)

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* This decision is not reported; but it is mentioned in the respondent's case, that the judgment was 'pronounced by the Court without the slightest difference of opinion. 'In particular, Lord President Blair, by whom all the judgments were pronounced, 'concurred in every one of them; and in pronouncing the last decision, though his Lord- 'ship stated that at one time he had doubted whether the respondent was not bound 'and required to give the whole ground up to the line of the circle on the west side, he 'added, that he had never entertained the slightest doubt about the power of the re- 'spondent to give the lease on the terms stipulated.'

No. 16. JOHN WATT, Appellant.—*Warren—Noland.*

DAVID BLAIR, The TRUSTEES for FISHERIES, &c., in Scotland, and J. CAMPBELL and T. WILLIAMSON, Respondents.—*Gifford—Moncreiff.*

Reparation—Trustee.—Held,—1.—(reversing the judgment of the Court of Session,) that an allegation against a defender of having instigated other parties to do an injurious act to the pursuer, was competent to be proved, although these parties were not called as defenders; and,—2.—(affirming the judgment of the Court of Session,) that gratuitous trustees, acting bonâ fide in the supposed discharge of their duty, were not liable in damages.

June 25. 1821.

2D DIVISION. Lords Newton and Gillies.

IN August 1808, Watt having imported into Dundee a quantity of linseed, Blair, one of the officers of the Trustees for Manufactures, &c. in Scotland, presented a petition to the Sheriff of Forfarshire, stating that he had lately surveyed the linseed, which he found to be bad, and as such prohibited by the statutes 3d Geo. I. c. 7, 13th Geo. I. c. 26, and 24th Geo. II. c. 31, from being imported or sold, or exposed to sale in Scotland; that Watt was about to sell it to be exported to Ireland; and praying to have it condemned, and the penalties provided by the above statutes awarded to him. After various proceedings before the Sheriff, it was agreed to have the quality of the linseed ascertained by inspectors mutually chosen. This having been done, the inspectors reported that one parcel was good, and recommended the vegetative powers of the other to be ascertained by experiment. Blair, however, insisted upon a proof; and the Sheriff, upon advising it, found the one parcel to be good, which he authorized Watt to sell, and directed the above experiments to be made on the other. Against this judgment Blair entered an appeal to the Circuit Court of Perth, which was objected to as incompetent; because, although an appeal was permitted by the statutes against a sentence condemnatory, none was allowed where there was a decree of absolvitor. A judicial arrangement was then made, by which Watt agreed that the parcel which had been found good by the Sheriff should be exported, or sold for crushing into oil; that he should abide by the result of an experiment to be made on the other parcel; and that if it should be found not to be fit for sale, then he should dispose of it in the above manner. In this Blair acquiesced, and the Court, (without prejudice to this arrangement,) certified the case to the High Court upon the question of competency. Eight months having elapsed, and no further proceedings having been taken in the appeal, it fell in terms of a provision in the above statutes. A new seizure was

subsequently made by Campbell and Williamson, officers of the Trustees for Manufactures, &c., and an application made to the Sheriff to have the linseed condemned. The Sheriff having found that the question had been finally settled by the judicial arrangement before the Circuit Court, and pronounced judgment accordingly, Campbell and Williamson entered an appeal to the High Court of Justiciary. That Court remitted to the Sheriff 'to dismiss the action, and grant warrant for delivering up the seed in 'question to the respondent (Watt,) in terms of the interlocutors 'pronounced by the Sheriff in the action at the instance of the 'said David Blair, and which was the subject of the appeal at 'the last Spring Circuit;'—'in respect that the linseed in question is the same cargo anent which an appeal was taken to the 'Circuit Court of Justiciary held at Perth in spring 1809, which 'was certified to this Court, and the appeal in which was allowed 'to fall, by not being insisted in within the period limited by the 'act of Parliament; and therefore that the present action was 'totally incompetent.' June 25. 1821.

Watt thereupon brought an action in the Court of Session against Blair, stating that all the proceedings had been resorted to oppressively, and at a time when there was a great scarcity of linseed, and a high price was given for it; that Blair was himself a dealer in linseed, and was actuated in his whole conduct by a spirit of rivalry; that when the cargo in question arrived, he had been called on to examine it, but had failed to do so; that, on subsequently being directed by the Trustees to do so, samples had been delivered to him for the purpose of ascertaining its quality; but that, being desirous to prevent the linseed from being brought into the market, he, instead of examining, had seized it; that, with the same view, he had maintained the litigation before the Sheriff Court, and entered an incompetent appeal to the Circuit Court; that the second seizure had been made by Campbell and Williamson at his instigation; and that, by this illegal conduct on the part of Blair, he had been prevented from selling the wheat at a time when a very high profit could have been obtained. He therefore concluded for £10,000 as the damages which he had thus sustained. Lord Newton, on the 14th of December 1810, found, 'In respect the seed libelled on was imported in'to Dundee as crushing seed, and attempted to be sold by the 'pursuer as sowing seed, that the defender David Blair was in 'bonâ fide to make the seizure, and subsequent appeal to the 'Circuit, and take the other steps which he did, till a second 'seizure was made by Campbell and Williamson: And in respect 'he has not called Campbell and Williamson as defenders in this 'action, finds it is not competent to prove that the defender in-

June 25. 1821. 'stigated and abetted them;' and therefore assoilzied Blair. To this interlocutor the Court, on the 21st of February 1812, adhered. Against this judgment Watt reclaimed, and he then brought an action against Campbell and Williamson and the Trustees, concluding against them for damages on account of the second seizure. In defence, the Trustees pleaded, That they had caused the seizure to be made after they had taken the advice of counsel, by whom they were instructed that it was their duty to cause it to be seized; that the duty which they performed to the public was gratuitous; and therefore, having acted bonâ fide, they were not responsible. By Campbell and Williamson it was pleaded, That they were the officers of the Trustees, and that they had made the seizure in obedience to their orders. The Court, on the 17th of November 1812, (on the report of Lord Gillies,) conjoined the actions, refused the petition for Watt, and 'assoilzie 'the Board of Trustees from the supplementary action, but find 'no expenses due to the Board; and decern.' *

Watt having appealed against these interlocutors, the House of Lords 'Ordered and adjudged, that so much of the said interlocutor of the Lord Ordinary, of the 14th December 1810, 'as finds that, in respect the appellant had not called Campbell 'and Williamson as defenders in that action, it was not competent 'to the appellant to prove that the respondent Blair, the defender 'in that action, instigated and abetted them, and therefore assoilzied the defender from the conclusions of the libel, and decerned, 'be reversed: And it is further ordered and adjudged, that the 'cause be remitted back to the Court of Session, to review as well 'the rest of the said interlocutor of the 14th December 1810, as 'the interlocutor of the 21st February 1812, and the interlocutor 'of the 17th November 1812, except such part of the said interlocutor of the 17th November 1812 as absolves the Board of 'Trustees, which part is hereby affirmed; and, upon such review, 'to do in both actions as shall be just.'

The Lord Chancellor, after detailing the facts and the procedure in the actions before the Sheriff and the Court of Justiciary, observed that it was necessary that he should call the attention of the House particularly to the summons in the present action. After stating the proceedings before the Sheriff, and the judgment pronounced by that Judge on the 16th of April 1809, the summons alleged that this judgment 'having been pronounced upon a full investigation by the Sheriff, acting ministerially under an act of Parliament; and upon an application at the said David Blair's instance as a public officer, he ought to 'have been satisfied therewith, the law authorizing no appeal in cases

* Not reported.

'of the like nature, unless against a sentence condemnatory,'—that is, the appellant contended, by his summons, that a party suffering under a judgment condemnatory, had a right of appeal to the Circuit Court, and that a party seeking condemnation had no such right of appeal. The summons then set forth the other proceedings that followed, (which his Lordship had already stated.) It then states the consequence thus: 'That in consequence of the improper, illegal, and oppressive proceed-'ings above detailed, instituted, promoted, and carried on by the said 'David Blair, or through his means, the pursuer not only lost the whole 'of the last season in the disposal of his linseed, and in which it might 'have been sold for great profit and advantage; but, from the great im-'portation into Scotland during the present year, the price of that article 'has decreased so much, that the pursuer had no hope of selling the said 'linseed at a price equal to its original cost; he, therefore, upon the '7th day of April (then) last offered delivery of the said two cargoes 'of linseed to the said David Blair under form of instrument, and pro-'tested that he should be liable to him, the said pursuer, in the highest 'price at which the pursuer might have sold the said linseed since the 'importation thereof.' June 25. 1823.

The summons therefore concluded, 'That the said David Blair 'ought and should be decerned and ordained to make payment to the 'pursuer of the sum of £10,000 sterling, or such other sum, less or 'more, as should be ascertained to be the just and true amount of the 'loss, damages, and expenses incurred, or to be incurred, by the pur-'suer, by and through the conduct and proceedings of the said David 'Blair.'

In the proceedings upon the summons, it became matter of contention whether it was to be considered as in the nature of an action of tres-pass in England; that is, if the seizure was illegal, whether the officer was not liable, whether he acted maliciously or not in making it; or whether it was to be considered as in the nature of an action upon the case in England; that is, whether, though the seizure should have been illegal, the officer was liable if he acted bonâ fide, or without malice.

It is to be remarked, that this action was against Blair only, not merely on account of the first, but also on account of the second seizure, and that neither the Board of Trustees, nor Campbell and Williamson, were made parties to it; and that, when it came before Lord Newton, a Judge of great eminence, he pronounced this interlocutor: 'Having 'considered the libel and defences, and heard parties' procurators—in 'respect the seed libelled on was imported as crushing seed,' (his Lord-ship observed this was a mistake—no seed could by law be imported as crushing seed,) 'and attempted to be sold by the pursuer as sowing 'seed;' (this also his Lordship observed was not so,) 'Finds the de-'fender David Blair was in bonâ fide' (so that Lord Newton considered this as if it were an action on the case, and as if the officer acted bonâ

June 25. 1821. fide, he was not liable) ' to make the seizure and subsequent appeal to ' the Circuit, and take the other steps which he did, till a second sei- ' zure was made by Campbell and Williamson; and in respect he has ' not called Campbell and Williamson as defenders in this action, finds ' it is not competent to prove that the defender instigated and abetted ' them; therefore assoilzies the defender from the conclusions of the ' libel, and decerns.'

Upon this interlocutor several questions presented themselves.

1. Whether Blair acted bonâ fide?

2. Whether, if he acted bonâ fide, he would thereby be liberated from the consequences?

The Lord Ordinary finds that Blair was in bona fide to make the seizure, and take the other steps which he did, till the second seizure was made; so that his Lordship seems to think a distinction was to be made between the first and the second seizure. Whether Blair was in bona fide, after the second seizure, Lord Newton gives no opinion, but says, ' In respect he has not called Campbell and Williamson as de- ' fenders in the action, finds it not competent to prove that the de- ' fender instigated and abetted them.'

This is the interlocutor first appealed from; and even supposing Blair was in bona fide till the second seizure, I doubt whether this interlocutor was sound, in alleging that, ' in respect the pursuer has not ' called Campbell and Williamson, it is not competent to prove that the ' defender instigated and abetted them.' (His Lordship here read the words of the summons, in so far as it relates to the aiding and abetting.) If A. instigate B. to abet him in an illegal act, I am not prepared to say that he was not a person that might be sued for damages by reason of such illegal acts. I therefore doubt the soundness of Lord Newton's interlocutor in this respect. If Campbell and Williamson were the instruments of Blair, he was bound to indemnify them for these acts in which they were his instruments. It therefore does not appear to me that it was necessary to bring these parties before the Court. But all parties were brought before the Court. A difficulty was thus introduced in the case, which otherwise would not have arisen.

On the 21st February 1812, an interlocutor was pronounced by the Second Division of the Court of Session, which was the second interlocutor appealed from. It was pronounced before the Board of Trustees and Campbell and Williamson were made parties. The ratio of the interlocutor is not stated. It merely sustains the defences, and assoilzies the defender. Whether it followed the ratio given in Lord Newton's interlocutor, or proceeded upon other grounds, as well as the grounds therein stated, does not appear.

After this, the appellant brought his action against the Board of Trustees and Campbell and Williamson, with conclusions in the summons against these parties similar to those in the summons against

Blair; and a minute was given in, in which it was stated, that 'the 'petition for the pursuer in the said action against the said David Blair 'is so stated as to contain the whole of the pursuer's case in this action 'against the Board of Trustees, and James Campbell and Thomas Wil- 'liamson; and therefore craved the Court to conjoin the two actions, 'and find the whole defenders, jointly and severally, liable in damages 'to the pursuer.' A minute was also given in for the respondents, referring to the answer of the respondent Blair. June 25. 1821.

The interlocutor pronounced after these minutes were given in, was in these words, (17th November 1812:) 'The Lords having resumed 'consideration of this petition, with the answers, the process against the 'Board of Trustees at the instance of the petitioner, and minutes given 'for both parties, of consent conjoin that process with the original ac- 'tion; and having advised the whole, refuse the desire of the petition, 'and adhere to the interlocutor therein complained of; assoilzie the 'Board of Trustees from the supplementary action, but find no ex- 'penses due to the Board, and decern.'

A difficulty arose, of this nature. The first summons was against Blair only: The second summons was against the Board of Trustees and Campbell and Williamson, but prayed nothing against Blair; and when the Court came to pronounce their interlocutor, that interlocutor does not assoilzie Blair, leaving, as I suppose, the former interlocutor to remain in this respect. The interlocutor assoilzies the Board of Trustees, but does not assoilzie Campbell and Williamson. At first, I conceived this must have been a mistake; but, upon looking at the certified papers, I find the interlocutor correctly stated.

It might be according to the form of proceeding in the Court of Session, (and I do not mean to say it was not,) that there was an end of the action against all the parties; but, according to the view I have been enabled to take of the matter, (and I have been enabled to obtain information elsewhere,) I am unable to find that this action was brought to a conclusion against Campbell and Williamson, or against Blair, unless it was to be so inferred from the former interlocutor.

In these circumstances, I do not see how this interlocutor makes an end of the cause. If it had assoilzied all the parties, then the House would have had to consider whether it was right in so doing. But as it had not done so, perhaps the most respectful way would be to remit, with some findings, which I propose to embody in the shape of a judgment, to be submitted to the House.

Lord Redesdale observed, that all the acts founded upon were very different in point of language, and that nothing was so injurious as that acts of Parliament should use different words, if they meant to express the same thing. The acts of Parliament in the present case were so worded as to make it very difficult to say what was their meaning.

In the next place, his Lordship observed, that these acts were de-

June 25. 1821. fective, unless there was some other act; because these acts applied to the case of seed from flax raised from Scotland, as well as seed imported from abroad; but no seed was allowed to be crushed into oil, unless it had received damage at sea, and it might receive damage from other causes. The Board of Trustees, therefore, appear to have been driven into an irregular course, which was not authorized by the acts of Parliament, of allowing seed to be crushed into oil.

Another circumstance was, that if there were to be such proceedings upon these acts of Parliament, which were to endure for such a period of time as had happened in the present case, seed which might be fit for use at the period of a first seizure, might be unfit for use at the period of a second; not to mention that the season might be lost for sowing at a time when the seed was fit for it.

His Lordship, therefore, submitted it to the consideration of the Trustees, whether some general act should not be brought into Parliament, combining all these acts, and providing for all the difficulties that had arisen in the present case, because otherwise the present acts might be used as instruments of oppression.

A. MUNDELL,—SPOTTISWOODE and ROBERTSON,—Solicitors.

(*Ap. Ca. No.* 30.)

No. 17.

JOSEPH ASTLEY, Appellant.—*Warren—More.*
JOHN TAYLOR, Respondent.—*Romilly—Forsyth.*

Patent.—The Court of Session having found that the specification of a patent was not sufficiently expressed to entitle the patentee to pursue an action for violation of it, a remit made to ascertain this and other facts by a jury.

June 25. 1821.

2D DIVISION. Lord Meadowbank.

ASTLEY, conceiving that he had made a discovery of an improved mode of manufacturing sal ammoniac, obtained a patent, of which the specification was in these terms: 'I, the said Joseph Astley, do hereby declare, that the nature of said invention is described in manner following: That is to say, I prepare the salt called muriate of magnesia, or the muriate of alumine, or one or other of the metallic muriates, or any of the combinations of muriate acid from which the acid is capable of being disengaged by heat. What I commonly employ is the muriate of magnesia, which may be procured in different ways, and very easily and economically from the mother liquor of salt-pans, called bittern or salt oil. The other salts contained in this being separated by evaporation and crystallization, I use

'the muriate of magnesia, prepared by this or by any other pro- Jun 25. 1821
'cess, or any of the other articles above mentioned, either in a
'liquid or in a solid form. In the former way, I cause animal
'substances of all kinds, or such vegetable or animal substances
'as afford ammonia or volatile alkali by distillation, to be im-
'pregnated with liquor, holding any of the said salts in solution;
'which liquor I use in proportions, varying according to the par-
'ticular kinds of salt employed, the degree of concentration of
'the liquor, and the nature of the animal or other substances
'to be impregnated, the object being to obtain the acid and al-
'kali developed in the subsequent operation, in proportions ap-
'proaching as nearly as possible to mutual saturation. I after-
'wards dry the animal or other substances thus impregnated on
'a heated floor or otherwise, and either distil them by the heat of
'a furnace, in a retort or still, with one or more receivers adapt-
'ed to collect the products, or else burn them in a kind of fur-
'nace or kiln (which may be variously constructed,) the products
'of the combustion being collected in chambers or receivers
'adapted to the purpose, which chambers or receivers must have
'an opening or vent to maintain the current of air necessary for
'the combustion. The previous drying is not an essential part
'of the process, and in some cases may be dispensed with, though
'it will generally be found expedient. When I use the salt in
'a solid form, that is, either crystallized or dried by evaporation,
'the process is merely to mix it in such state with the animal or
'other substances, and proceed as above; but I find that the
'object is effected more easily and completely by using the salt
'in the state of solution, or, instead of impregnating the animal
'or other substances themselves with any of the saline matters
'above described, I cause substances of any description what-
'ever (provided there be nothing in their nature rendering them
'chemically or mechanically unfit to serve as vehicles for such
'purpose) to be impregnated with such saline matter, and treated
'as above described, along with the animal or other substances,
'the fundamental object of all these processes being to present
'the acid and alkali to each other in their nascent state, as they
'are respectively developed from the said saline matter, and the
'animal or other substances by heat, by which means we obtain,
'on the one hand, a more complete decomposition of the said
'salts, by help of the divellent affinity of the ammonia, and we
'prevent, in a great measure, on the other hand, the destruction
'of the alkali by combustion, which would otherwise occasion
'great loss in the burning of the materials. In all the processes
'here described the product is the same, being muriate of am-

June 25. 1821. ‘monia or sal ammoniac, partly dry and partly in solution, which ‘is afterwards to be crystallized and sublimed according to the ‘ordinary processes, or which may be used for some purposes ‘without undergoing these subsequent operations. It may be ‘proper to state, that I do not here lay claim to the exclusive ‘privilege of procuring muriatic acid from the salts above men- ‘tioned by distillation, as it has been long known to chemists ‘that several of them are decomposible by heat. My claim is to ‘the modes of effecting this decomposition, as here explained, ‘which will be found to possess, besides the advantage already ‘mentioned, that of avoiding the inconveniences with which the ‘operation of distilling the muriate salts in question (particularly ‘the muriate of magnesia) by themselves is always attended.’ Astley, alleging that Taylor had clandestinely discovered his mode of operation, and had violated his patent, brought an action of damages and of interdict against him. In defence, Taylor stated, 1. That he had not violated the patent. 2. That the specification was insufficient; and, 3. That the alleged invention was not valuable, because it consisted of a mere modus operandi,—well known materials being used for the production of a well known commodity. After allowing a condescendence and answers, the late Lord Meadowbank found ‘nothing correctly or relevantly ‘stated, on the part of the defender, to impede the pursuer’s ‘right to the exclusive use of the process for manufacturing sal ‘ammoniac, as described in the specification protected by the ‘patent, and particularly such use of the muriate of magnesia ‘contained in the bittern or refuse produced in the preparation ‘of common salt from sea water;’ and allowed to Astley a proof of his allegations as to the violation of his patent. Taylor having reclaimed, the Court appointed Dr. Hope to visit the works of the parties respectively, and to report. Dr. Hope having reported that the process was original and useful, but that the specification was inadequate, the Court, on the 27th of November 1813, ‘sustained the objection to the title of the pursuer, in re- ‘spect of the want of due specification in his patent; and there- ‘fore alter the interlocutor reclaimed against, dismiss the action, ‘and decern; but find no expenses due.’ Against this judgment Astley reclaimed, and offered to prove, by the evidence of men of skill, that the specification was sufficient to enable them to perform the operations for which the patent was granted. The Court having allowed him to prove accordingly, he, in support of this allegation, adduced Dr. Murray, Professor Leslie, Mr. Charles Macintosh, and Mr. Charles Tennent of Glasgow, Dr. Thomas Thomson, Mr. Tilloch, Mr. Nicholson, Mr. Accum,

and Professor Brande of London, all of whom deponed that the specification was sufficient to enable them to conduct, or direct the conducting, of the processes by which the improvements were to be carried into effect. On the other hand, Taylor adduced several operative chemists, who deponed that the specification was insufficient to enable them to carry the improvement into effect successfully. The Court having ordered a hearing in presence, Taylor contended that the evidence of operative chemists was, in a question of this nature, to be preferred to that of scientific men; that the specification was obscure and vague, because it neither contained a reasonable account of the proportions in which the materials ought to be mixed up, nor such a description of the apparatus as could disclose the nature of the improvement, so as to carry it into effect; that no rules were given for regulating the heat; that a variety of processes were confusedly mentioned, and that such a multitude of substances were to be used, as to convey no precise instruction. To this it was answered, that the accuracy of a specification ought to be judged of by the opinion of men of science, who alone could judge whether it was consistent with general principles, and capable of being carried into execution; that it was not addressed to the ignorant, but to those whose previous skill enabled them to apprehend it from perusal; and he contended that the evidence he had adduced established that the specification was sufficient for the purpose. The Court were at first equally divided; but Lord Pitmilly being called in, they altered their interlocutor, and 'repelled the objections stated 'to the pursuer's title, in so far as they are founded on the alleged 'defects in the specification.' Thereafter, Taylor having reclaimed, the Court was again equally divided; but Lord Craigie having subsequently become one of the permanent Inner-House Judges, they altered their interlocutor on the 19th of November 1816, 'sustained the objections to the pursuer's title, in respect 'of the want of due specification in his patent,' and assoilzied Taylor, with expenses; and to this interlocutor they adhered on the 3d of June 1817.* June 25. 1821.

Astley having appealed, the House of Lords 'Ordered that the 'cause be remitted back to the Court of Session, and that the 'said Court do direct the following issues to be transmitted to 'the Commissioners of the Jury Court, for the purpose of being 'tried by a jury, in manner directed by the statutes in that be-'half made and provided; namely, whether the respondent has, 'in the manufacture of sal ammoniac, made use of all or any, and

* Not reported.

June 25. 1821. 'which of the improvements in the manufacture of sal ammoniac, 'described in the specification enrolled by the appellant, in pursuance of the letters patent obtained by him for the sole use of 'sundry improvements in the manufacture of sal ammoniac; and 'whether any, and what part or parts of that which is described 'in such specification, and therein alleged to be an improvement 'or improvements in the manufacture of sal ammoniac, invented 'by the appellant, was or were known or used before the date of 'the said letters patent; and whether the said specification contains a particular description of the nature of the appellant's invention, and in what manner the same is to be executed, according to the true intent and meaning of the said letters patent: 'And it is further ordered, that in trying of the said issues, the 'appellant shall be the pursuer, and shall be bound to bring the 'same to trial within twelve months from this date, otherwise the 'respondent shall have leave to apply to this House for the affirmance of the said interlocutors; and if the Jury Court shall 'find for the appellant on the first issue, then the jury shall upon 'that issue be required to find what are the sundry improvements 'alleged in the said specification to have been invented by the 'appellant; and whether all such improvements have been used 'by the respondent, or only some, or one, and which of such improvements; and if the Jury shall find for the appellant on the 'second issue, then the Jury shall upon that issue be required to 'find in what particular or particulars the said improvement or 'improvements, or invention or inventions, consist: And it is further ordered, that thereafter the said cause be proceeded in, in 'such manner as shall be just.'

Appellant's Authorities.—Collyer on Patents, 56; Davies, 213. 279. 316. 398.
Respondent's Authorities.—Collyer, 75. 127. 181; Davies, 434.

J. RICHARDSON,—A. GRANT,—Solicitors.

(*Ap. Ca. No.* 31.)

Sir JAMES MONTGOMERIE and Others, Executors of WILLIAM DUKE of QUEENSBERRY, Appellants.—*Irvine—Cranstoun.*
DUKE of BUCCLEUCH and QUEENSBERRY and his Tutors, Respondents.—*Gifford—Mackenzie.*

No. 18.

Lease—Purgation—Entail.—Held (affirming the judgment of the Court of Session,) that purgation was inadmissible where, after the death of an heir of entail, it had been found and declared, that certain leases granted by him were beyond his powers, fell under the irritancy of the deed of entail, and so null and void.

July 2. 1821.

2D DIVISION. Lords Craigie and Cringletie.

In 1705, James Duke of Queensberry executed an entail of the estate of Queensberry, whereby, inter alia, he prohibited the heirs substitute 'to sell, wadset, or dispone any of the foresaid earl-'dom, lands, baronies, offices, jurisdictions, patronage, and others 'foresaid, nor any part of the same, nor to grant infeftments of 'liferent or annual rent out of the same, nor to contract debts, 'nor do any other fact or deed whereby the same or any part 'thereof may be adjudged, apprised, or any ways evicted from 'them, or any of them, except so far as they are empowered in 'manner after mentioned.' There was also a special prohibition against granting leases in these terms: 'And that the said Charles 'Douglas, nor the other heirs of tailzie above specified, shall not 'set tacks nor rentals of the said lands for any longer space than 'the setter's lifetime, or nineteen years, and that without dimi-'nution of the rental, at the least at the just avail for the time.' These prohibitions were fortified by irritant and resolutive clauses. By the irritant clause it was declared, that 'all such 'facts, deeds, and debts committed, done, or contracted contrary 'hereto, with all that may follow thereon, shall be in themselves 'void, null, and of no force, strength, and effect, such like 'as if the same had never been done, contracted, nor committed, 'in so far as concerns the said earldom, lands, baronies, and 'others above rehearsed, which, nor no part thereof, shall be any 'ways affected or burdened therewith, in prejudice of the said 'heirs of tailzie and provision above specified, appointed to suc-'ceed by virtue of these presents, which are made and granted 'sub modo, and with and under the provisions above specified, 'and no otherwise.'

In virtue of this entail, William Duke of Queensberry succeeded to the estate in 1778. He had adopted the practice of letting the lands for payment of a rent, with a grassum; and, prior to 1794, he had usually allowed the leases to expire, and then renewed them at the former rents, and for such additional grassum as could be obtained. In 1796, he formed a plan, by

July 2. 1821. which he resolved to grant leases upon a different system. With this view he entered into arrangements with the tenantry, by which, for large ready money payments, and for the former rents, he bound himself to grant leases for 19 years. These leases were divided into four classes,—first, leases which he granted to the tenants in the tacks which were current, or to strangers, under the burden of the current tacks, and with obligations, in both cases, to grant a new lease for 19 years annually during the Duke's life;—second, leases which he granted under a similar obligation to renew when those current expired;—third, leases without an obligation to renew, but where the current leases were not near their natural expiration;—and, fourth, leases without an obligation to renew, and not granted till the previous leases had expired. On the death of the Duke, his executors brought an action of declarator, to have it found that the leases so granted were effectual, and within his powers as heir of entail. In defence against this action, the Duke of Buccleuch (who had succeeded to the estate) pleaded that the leases were ineffectual; first, Because they were not proper leases, but complex contracts, conveying away the lands for a term of years, partly for yearly rent, but in great part for a grassum or price payable to the Duke himself;—second, Because they were granted for a space longer than the setter's lifetime, or 19 years, the obligation of renewal being part of the contract, and elongating the term of possession for which the lands were let;—third, Because the leases were not let for the just avail, but for a rent known or intended to be inadequate, and for less than that avail;—fourth, Because they were let with diminution of the rental actually existing previous to letting them, the Duke having previously, by grassums, received an additional rent for the lands beyond that stipulated in these leases. The Court of Session, on the 7th of March 1816, decerned in terms of the summons of declarator.* The Duke of Buccleuch having appealed, the House of Lords, on the 10th of July 1817, 'Ordered that the said cause be remitted back to the 'Lords of Session in Scotland, to review generally the interlocu-'tor complained of in said appeal; and, in reviewing the same, 'the said Court is to have especial regard to the fact, that this 'action of declarator is brought by the executors and trust-dis-'ponees of the late Duke of Queensberry as such against the 'heir of tailzie, seeking thereby to establish unconditionally all 'and each of the numerous tacks mentioned in the summons, and

* See Fac. Coll. Vol. 1815-1819, No. 44.

'granted by the said Duke in the manner and in the circum- July 2. 1821.
'stances mentioned in the pleadings, and is not instituted by any
'of the persons to whom such tacks are granted, nor are any of
'such persons parties thereto: And it is further ordered, that
'the said Court do reconsider the defences of the said appellants,
'and especially whether, in a question between such parties, the
'leases so granted ought or ought not to be considered as granted
'in execution of such device as is alleged in the said defences;
'and if so granted, whether the same ought to be considered as
'granted in fraud of the entail, and are or are not such as ought,
'on that account, or any other account, appearing in the plead-
'ings, to be held invalid, or not to be sustained at the instance of
'the pursuers, as representing the said Duke; and in reviewing
'the interlocutor complained of, the said Court do particularly
'also reconsider what is the legal effect of the word 'dispone,'
'contained in the deed of tailzie of the 26th of December 1705,
'with reference to tacks of the lands expressed in the said deed:
'And further, do reconsider what is the effect, with reference to
'such tacks, of all other parts of the said deed which relate to
'tacks, having regard to the endurance of such tacks, and to the
'fact of grassums being or not being paid upon the granting
'thereof, or paid upon the granting of former leases, and to all
'other terms and conditions upon which such tacks were made,
'and to the effect of such grassums, terms, and conditions in re-
'ducing the amount of the clear rent receivable by the heir, and
'to all the circumstances under which the appellants have alleged,
'and it shall appear that the late Duke of Queensberry granted
'such tacks: And it is further ordered, that the Court to which
'this remit is made do require the opinion of the Judges of the
'other Division in the matters and questions of law in this case
'in writing; which Judges of the other Division are so to give
'and communicate the same; and after so reviewing the said inter-
'locutor complained of, the said Court do and decern in this
'cause as may be just.'

After having complied with this order, the Court, on the 5th of February 1818, adhered to their former interlocutor, and decerned and declared in terms of the original libel.* Against this interlocutor the Duke of Buccleuch entered an appeal, but having died during its dependence, it was followed forth by the tutors of his son; and the House of Lords, on the 12th of July 1819, 'Ordered and adjudged that the said interlocutor complained of

* See Fac. Coll. Vol. 1815-1819, No. 151.

July 2. 1821. 'in the said appeal be, and the same is hereby reversed. And 'the Lords find, That William, late Duke of Queensberry, 'had not power, by the entail founded on by the parties in this 'cause, to grant tacks for terms of years, partly for yearly rent, 'and partly for a price or sum paid to the Duke himself; and 'that tacks granted by him upon surrender of former tacks, 'which had been granted partly for yearly rent, and partly for 'prices or sums paid to the Duke himself, ought to be considered 'as partly granted for prices or sums paid to the Duke; and that 'such tacks ought not to be considered as let without diminution 'of the rental, or at the just avail, and are therefore to be consi-'dered as between the persons claiming under the entail, as tacks 'which he had not power to grant by such entail: And it is fur-'ther ordered, that with this finding the cause be remitted back 'to the Court of Session in Scotland, to do therein as shall be 'just and consistent with this finding.'

When this judgment came to be applied, the executors contended, first, That although it was thereby fixed that the late Duke had not power to let tacks partly for a sum or price payable to himself, yet it was not found that he had by the tacks in question contravened a prohibition, and incurred a forfeiture; and, secondly, Supposing the judgment to mean that a contravention had been incurred, it was competent to them and to the tenants to purge the irritancy, by converting the grassum in each lease into an annuity for the period of the lease, or for the period to which it was prorogated, and to pay this as an additional rent from the time of the late Duke of Queensberry's death, with interest from the respective terms at which it became due, and in future till the expiration of the lease. The Court having, on the 29th of February, and 6th July 1820, assoilzied the Duke of Buccleuch from the declarator,* the Executors entered an appeal, on the ground chiefly, that supposing an irritancy had been incurred, yet it was still competent to them to purge it in the mode above proposed; and that this could not be barred by the death of the contravener. In support of this they contended, that no third party can lose his right in any case by virtue of an entail, except by the direct operation of a resolutive clause forfeiting the right of the heir of entail, granter of the right; that, therefore, in cases where the heir of entail contravener is dead, and where, con-

* See Fac. Coll. No. 49. from which it appears that the Court unanimously held, 1. That the leases fell under the irritancy of the entail; and, 2. That purgation was both inadmissible and impracticable.

sequently, there can be no declarator of forfeiture, nor actual forfeiture; nevertheless the granter of such deed must be held to have forfeited his estate in the act of granting the right which is voided; that there cannot be a process of reduction of such deed, without its involving in principle a declarator of irritancy; and that it is competent in such process to purge the irritancy by a modification of the deed granted, and which is only objectionable on the ground of excess of power. To this it was answered, 1. That this being simply a process of declarator relative to the validity of the leases, and these having been found to have been deeds of contravention, and therefore invalid in terms of the irritant clause, nothing farther could be done than to pronounce decree of absolvitor; 2. That as the Duke, who was guilty of the contravention, was dead, no forfeiture could be declared against him; and, 3. That although it was competent where a party, having a power to do a certain act, exceeded that power, to restrain the act to that which was lawful, yet this was not purgation, but a restriction to the extent that the power was lawfully exercised; that the leases in question had been declared to have been altogether ultra vires of the late Duke; that they were therefore utterly null; and that being so, it was not competent, under the name of purgation, so to arrange matters, as, in truth, to make new bargains between the parties. The House of Lords 'Ordered and 'adjudged that the appeal be dismissed, and the interlocutors 'complained of affirmed.'

July 2. 1821.

Appellants' Authorities.—1503, c. 91; Queen's College, May 25. 1542, (7934); 1. Craig, 13. 18; Mack. Ob. 1567, c. 10; 2. Stair, 8. 19; Price, July 6. 1660, (not rep.); 8. Ersk. 8. 29.

J. CHALMER,—SPOTTISWOODE and ROBERTSON,—Solicitors.

(*Ap. Ca. No.* 37.)

No. 19. JOHN HISLOP, Appellant.—*Moncreiff—Maconochie—Whigham.*
DUKE of BUCCLEUCH, Respondent.—*Gifford—Mackenzie.*

Entail—Lease—Purgation.—Held (affirming the judgment of the Court of Session,) that where it had been declared, after the death of an heir of entail, that a lease granted by him was beyond his powers, and was struck at by the irritant clause, and purgation was inadmissible.

July 2. 1821.

2D DIVISION. Lords Craigie and Cringletie.

THIS case was connected with the preceding one, being one of the leases of the validity of which the Executors of William late Duke of Queensberry had brought a declarator. In 1787, his Grace had let to the late John Hislop, the father of the appellant, a lease for 19 years, at the previous rent of £30, and a grassum of £26. In 1797 Hislop renounced that lease, and obtained a new one for 19 years, at the same rent, and a grassum of £28; the Duke at the same time binding himself to renew the lease for 19 years, in every year of his own life, if required. On the 30th of December 1803, the lease of 1797 was renounced, and a new lease for 19 years was granted at the former rent, without any grassum. Of this lease, among others, the Duke of Buccleuch, the succeeding heir of entail, brought a reduction, on the ground, inter alia, that it was let 'evidently in diminution 'of the rental, no regard being had to the repeated grassums 'that had been received by the said Duke, which being in fact 'additional rents during the whole periods of the previous leases, 'the rate of annual value of these grassums ought of course to 'have been added to the old rent.' The Court, on the 7th of March 1816,* having assoilzied from the reduction, the Duke of Buccleuch entered an appeal, and a remit was thereupon made by the House of Lords, similar to that noticed in the preceding case. The Court, on the 5th of February 1818, again assoilzied, and the Duke thereupon entered another appeal; on advising which, the House of Lords, on the 12th of July 1819, 'Ordered and adjudged that the said interlocutor complained of 'in the said appeal be, and the same is, hereby reversed: And 'the Lords find that the late Duke of Queensberry had not 'power, by the deed of entail founded upon by the parties in 'this cause, to grant the tack in question in this cause, the same 'having been granted upon the surrender or renunciation of a

* See Fac. Coll. Vol. 1815-1819, No. 44, where it is stated, 'that the Court were 'unanimously of opinion that the leases could not be set aside on any of the grounds of 'reduction.'

'former tack then unexpired, and which former tack had been 'granted by the Duke at the same rent, and also for a sum or 'price received by him; and the said tack in question, therefore, 'having been granted partly in consideration of the rent re- 'served thereby, and partly in consideration of a price or sum 'before paid to the said Duke himself, and of the renunciation 'of the said former tack; and find, therefore, that this tack of 'the 30th of December 1803 ought to be considered, in this 'question with Hislop, as let with diminution of rental, and not 'for the just avail: And it is further ordered that, with this 'finding, the cause be remitted back to the Court of Session in 'Scotland, to do therein as is just and consistent with this finding.'

July 2. 1821.

When the case returned to the Court of Session, Hislop offered to purge the irritancy in the mode proposed by the executors in the preceding case. The Court, however, sustained the reasons of reduction, and reduced the lease; and the House of Lords 'Ordered and adjudged that the appeal be dismissed, and 'the interlocutors complained of affirmed.'

Appellant's Authorities.—1. Ersk. 8. 14; 1. Stair, 13. 14; Stewart, Feb. 1. 1726, (7275); Gordon, July 13. 1748, (2336, and Elch. No. 33. Tailzie); Price, July 6. 1760, (not rep.); Rosses, Nov. 18. 1766, (7289); Hope's M. P. 403. 407. 408; 3. Ersk. 8. 29; Kilk. 445; Gilmour, Mar. 6. 1801, (No. 9. App. Tailzie.)

J. CHALMER,—SPOTTISWOODE and ROBERTSON,—Solicitors.

(*Ap. Ca. No.* 38.)

Mrs. NASMYTH and Others, Appellants.—*Scarlett—Lushington.*
Dr. HARE and Others, Respondents.—*Romilly—Mackenzie.*

No. 20.

Testament.—Held (reversing the judgment of the Court of Session,) that a testament executed by a Scotchman who had long resided in India, and to which a seal had been attached, but which had been cut off, was revoked, although he was domiciled in Scotland, and the deed was holograph of, and subscribed by him.

See the circumstances of the case.

DR. JAMES NASMYTH, a native of Scotland, went early in life to India, where he remained till 1798. He then returned to Scotland, where he resided permanently at Hope Park near Edinburgh, but died in London, while on a visit, in 1813. His repositories at Hope Park were then opened, and the contents examined and inventoried, in virtue of a warrant of the Sheriff, in presence of the agent of the nearest of kin, of one of the assistants of the Sheriff Clerk, and other persons appointed by the Sheriff. In a

July 27. 1821.

2D DIVISION. Lord Craigie.

July 27. 1821. closet which was locked, many valuable articles and papers were found; and, among others, it was stated, in a minute made at the time, that there was 'a paper entitled on the back 'Will of "James Nasmyth, 28th September 1803,' consisting of two pages 'and a half, and signed on the last page 'James Nasmyth,' and 'which paper has also a writing or memorandum written with pen-'cil; and of which writing or memorandum, in case the same 'should be defaced, or become illegible from being handled, or 'otherwise, an exact transcript, verbatim et literatim, is just now 'made, and signed accordingly, by the parties present at this 'meeting: Also a separate unsigned memorandum, which is 'stated by Mr. Gordon to be holograph of the said deceased 'James Nasmyth, and apparently relates to the distribution of 'his property, and which it has accordingly been thought proper 'to be put up with the said paper.' All the papers (including those mentioned) were put into the custody of the agent of the nearest of kin, who carried them to his own house. The paper of the 28th September 1803 was in the following terms, several parts of it being interlined with pencil, and, in other words, struck out by the same means.*

'In the name of God. Amen. I constitute and appoint this 'to be my last will and testament, hereby revoking all others. 'To thee, O Lord God of my fathers, I resign my soul. In 'very truth and deed, I confess myself to be the chiefest of the 'chief of sinners. I cry to thee for mercy, in and with some 'hope of pardon, through and for the sake of the perfect right-'eousness and blood of thine own Son Jesus Christ, whom thou 'lovest, and in whom thou art ever well pleased. I constitute 'and appoint my dear sister Mary Nasmyth, Mr. *John Gordon*,† 'W. S. of Edinburgh, Dr. James Hare, (of C——— Hall, 'senior,) *late from India*, Mr. James Mackay, now there, Mr. 'Samuel Williamson of *St. Andrew Square*, Edinburgh, and 'Mr. J. Carstairs of London, merchant, to be my executors. 'I give and bequeath to my old and faithful friend, the foresaid James Mackay, the sum of £1200 sterling. I give 'and bequeath to the said John Gordon £200 sterling. I ear-'nestly request that Dr. Hare will accept of some token of what 'my heart feels for his generous and friendly conduct to me. 'Let my executors urge, and leave the kind to himself. I give

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* The *interlineations* are pointed out by being included within parentheses, and the words *struck out* are printed in italics.

† The words 'John Gordon' were obliterated, so as to be scarcely legible.

'and bequeath to the said Samuel Williamson £200 sterling, July 27. 1821.
'*and remit what he owes to me.* I give to John Gunn, for his
'attention to my afflicted brother Robert, £20 sterling, with ex-
'pectation that this will fix and increase his assiduity, rather than
'tend to lessen it. I give and bequeath to the poor of my native
'town Kirkcudbright £200 sterling, which must be distributed
'wisely and gradually by the Magistrates of that town. I give
'and bequeath to the children of Mrs. George Ross of London,
'extra jus mariti, £600, to be divided equally among—when—
'and at the discretion of my executors alone. I give and bequeath
'to Robert Clark, the eldest natural son of the late James Clark
'(of Calcutta,) £400 sterling; and I give and bequeath to the
'younger son, John Clark, £400 sterling. But these sums are
'to be managed, used, and applied, according to the prudence
'and sole determination of my executors. I give and bequeath
'to each of the children of the late Mrs. Christian Wright £60
'sterling, to be managed, used, and applied, according to the
'prudence and determination of my executors, and (extra) with-
'out the interference of their father. I give and bequeath to
'the children of Sir James Nasmyth of Posso £400 sterling,
'to be shared equally among them. I give and bequeath to the
'London Missionary Society £100, and the same sum to (the)
'Edinburgh Missionary Society. I give and bequeath to the
'different charity schools and charitable societies (institutions)
'in Edinburgh £500 sterling, to be distributed and applied ac-
'cording to the selection and determination of my executors. I
'give to the Rev. David Black, one of the Ministers of Edin-
'burgh, £20 sterling. I request that a large, clear, and elegant
'edition of the Holy Bible be presented to my brother Dr. Thomas
'Nasmyth, with a brother's affectionate wishes that the moral in-
'structions, and the practice of honourable conduct, may influence
'the parent,* to whose dear children I give and bequeath the
'sum of £500 sterling, to be equally divided among them, with
'an uncle's blessing. May he accept this as cordially as I, in
'the view of the Creator, offer it now. I give and bequeath
'to the said Mary Nasmyth, my beloved sister, the whole
'and all the remainder of my property (personal and real,) of
'whatever denomination, to be used and disposed of as she
'pleases. She will, I know, enjoy it for herself honourably and
'prudently, and distribute liberally. Lastly, of my bosom brother
'Robert, I feel that my fixed sentiments, and my gratitude for

* A foot-note was here made thus: 'The folio Bible containing the family names.'

July 27. 1821. 'his affectionate conduct and generous purposes towards me, cannot be expressed. Therefore, O merciful and all-powerful Lord God, I beseech thee to look down and bless (him) by restoring his understanding, so that he may have the renewed sense of thy pardon, reconciliation, and fatherly chastisement. Habitually did he worship thee....In testimony of this being my last will and testament, I hereto set my hand and seal, and declare it to be written upon three pages, and signed in my own handwriting, at Edinburgh, this 28th day of September 1803.—JAMES NASMYTH.'

This deed was thus titled on the back: 'Will of James Nasmyth, Sept. 28. 1803;' and the following memoranda were indorsed in pencil:

'See my several memoranda for a new disposition, to be done forthwith, for she has gone as far as she can; and I must use the remainder as well and usefully as I can, generally and to public beneficence, recollecting that is left is freely given by my God and benefactor.—*Jan.* 1810.

'Be sure to destroy this after writing the other.—*N. B.*

'*July* 1810.—To appoint William Kerr, Sec. to the Gen. P. O., instead of,' &c.

The separate memorandum alluded to in the minute was in these terms:

'J. N. directs that his third of the property of Whitehill and Craiglay be sold soon after his death, and the amount he gives and bequeaths to the magistrates of his native town, Kirkcudbright; the interest only to be applied (by them) to relieve the native poor of that place, prudently and judicious. (And) The principal sum to be placed at interest on the safest landed security.

'J. N. appoints as one of his executors W^m^ Kerr, Sec^y^ of the G. Post Office, with a legacy of one hundred guineas; w^e^ sum must also (be) given to Samuel Williamson, one of my executors.—*July* 1811.—J. N.

'J. N. gives and bequeaths to the only son of his late brother Thomas N. by (Mary) Sarah, or Sarah Mary Nasmyth, the sum of one hundred guineas,—regretting the insuperable prejudices against *me* (him) which he and his said wife have instilled into their mind, manifested by their behaviour to him. J. N.'

Dr. Hare and others having obtained themselves confirmed executors, Mrs. Nasmyth and others, the nearest of kin, brought, inter alia, an action of reduction of their nomination, and of the will and codicil, and also an action of count and reckoning. In support of the reduction they alleged, 1. That the will had been

originally sealed, but that the seal had been cut off by Dr. Nasmyth, thereby indicating his intention to revoke, and that such an excision had been made was evident ex facie of the deed; and, 2. That this intention to revoke was confirmed by various circumstances, particularly by his subsequently succeeding to a large fortune, by entries in a memorandum-book that he had such an intention in contemplation, by the death of the residuary legatee in the mean while, and by the will having been found hung up on a peg along with other useless papers. To this it was answered, 1. That the will was holograph and duly signed by Dr. Nasmyth, and was therefore a complete valid deed by the law of Scotland; that nothing was said, in the minute made at opening the repositories, of there having either been a seal, or that it had been cut off, and that esto the seal had been cut off, this was not relevant to establish an intention to revoke; because, independent of the seal, the deed was perfectly good and complete; and, 2. That as there was no other will, and there was no written evidence of cancellation, the circumstances alleged were not sufficient to infer cancellation. Lord Craigie, in the reduction, 'sustained the defences, so far as they relate to the general validity 'of the latter will and testament of the late Dr. James Nasmyth, 'and the appointment of the defenders as executors; and to that 'extent assoilzies the defenders, and decerns: And in the action 'of count and reckoning finds, that though the defenders are 'obliged, from time to time, when required, to communicate to 'the pursuers or their agents distinct states of the funds, and of 'their administration as executors, they cannot be required in hoc 'statu to institute a formal count and reckoning in manner proposed by the pursuers, nor to enter into the question, treated at 'great length in the pleadings for the pursuers, as to their right 'or title, as executors, to retain, in virtue of the enactment in '1617, a certain portion of the funds which belonged to Dr. Nasmyth.' To this interlocutor the Court, on the 7th of June 1817, adhered.* July 27. 1821.

Mrs. Nasmyth and the other next of kin then appealed; and, in addition to the special circumstances, they contended that the excision of the seal must be held to have been made by Dr. Nasmyth animo revocandi, unless positive evidence were adduced to the contrary; and that this excision was of itself sufficient to establish his intention to revoke. In support of this, they pleaded

* Not reported.

July 27. 1821. that the principle by which such cases were governed was, not that a will remains valid, provided the original requisites to its validity, when first executed, continue in existence at the death of the testator, but that it is to be held as annulled and revoked wherever there appears upon it an act of cancellation whence the animus revocandi can be inferred:—that although sealing might not be essential to the *validity* of the deed by the law of Scotland, yet the excision of the seal was sufficient to establish the *intention to revoke;* and that the question was, therefore, reduced to the inquiry, quo animo the testator originally affixed his seal. This, they maintained, could have been with no other view than to give authority to the deed, which was confirmed by his long residence under the English law in India; and consequently that the removal of the seal showed that his intention was to destroy its authenticity, and thereby to revoke and cancel it.* To this it was answered, that as no mention was made in the judicial minute, at opening the repositories, of the excision, the presumption was, that the seal was then affixed; and therefore it was incumbent on the opposite party to establish the excision during the life of Dr. Nasmyth:—that, however, assuming that it had been made by him, no inference could thence be deduced affecting the validity of the will, because, by the law of Scotland, a seal is of no more value than a wafer, and is absolutely useless; and consequently its removal left the deed as effectual as if it had never been attached:—that as Dr. Nasmyth was a Scotchman, he must have been aware of this; and therefore it could not be inferred that, by doing an act which could not in law injure the validity of the deed, he intended to destroy it. The House of Lords 'Ordered and adjudged that the interlocutors 'complained of be reversed; and the Lords find that the instru-'ment, bearing date the 28th September 1808, produced as the 'last will and testament of Dr. James Nasmyth, was revoked and

* It is stated in the case of the appellants, that 'the respondents, as asserted exe-'cutors, propounded these testamentary papers in the Prerogative Court in the year '1815, the deceased having left large personal property within the province of Can-'terbury. When the allegation propounding these papers was debated, the learned 'Judge (Sir J. Nicholls,) holding up the fac-simile of the will, immediately said, 'The "excision of the seal was primâ facie an act of cancellation, animo revocandi; that if "the executors meant to deny that the will was in this cancelled state at the de-"ceased's death, they must distinctly aver the fact, and prove it by evidence; that "argument and insinuation alone were inadmissible for such a purpose; that he must "presume that the papers were in the same plight and condition as found at the de-"ceased's death, until the contrary was proved.' The question before that Court, however, was superseded till the decision of the Court of Session should be ascertained, Dr. Nasmyth being a domiciled Scotchman.

'annulled by him; and that the several indorsements thereon, 'together with the paper produced and insisted upon as a codicil 'thereto, are of no avail or effect in law as testamentary disposi-'tions: And it is further ordered, that, with this finding, the 'cause be remitted back to the Court of Session, to do therein as 'shall be consistent with such finding, and as shall be just.' July 27. 1821.

The LORD CHANCELLOR, after mentioning the names of the parties, and the interlocutor of the Lord Ordinary, stated—My Lords, your Lordships observe the terms of this interlocutor are, to 'sustain the de-'fences, so far as they relate to the general validity of the latter will 'and settlement of the late Dr. James Nasmyth, and the appointment 'of the defenders as executors.' I repeat the terms of this interlocutor, because it is difficult, in many parts of the proceedings, to be quite clear whether they contain a judicial determination, not only upon the validity of a former will, but likewise whether they are to be considered as containing a judicial determination upon all the papers which may be looked at as being of a testamentary nature. These words, 'the 'appointment of the defenders as executors,' incline me to suppose that the paper of 1811, which I shall have occasion presently to point out to your Lordships' attention, must have been considered by those who framed the present interlocutor, as part of the latter will and testament of James Nasmyth, because one of the defenders, Mr. William Kerr, is made an executor only by that paper, as your Lordships will observe by and by. 'And in the actions of count and reckoning finds, that 'though the defenders are obliged from time to time, when required, 'to communicate to the pursuers or their agent distinct states of the 'funds, and of their administration as executors, they cannot be re-'quired, in hoc statu, to institute a formal count and reckoning in 'manner proposed by the pursuers, nor to enter into the question, treated 'at great length in the pleading for the pursuers, as to their right or 'title, as executors, to retain, in virtue of the enactment in 1617, a 'certain portion of the funds which belonged to Dr. James Nasmyth.'

My Lords, with respect to this part of the interlocutor of the Lord Ordinary, it appears to me that there is no occasion to trouble your Lordships; for though it may be possibly a very material question, what is the true construction of the enactment in 1617, yet, in my view of the case, it will not be necessary for the present purpose to enter into that consideration. My Lords, without stating at length the subsequent interlocutors complained of, they all proceed as interlocutors affirming the statement that this Dr. James Nasmyth has made a valid will and testament; and the only question your Lordships have to decide is, Whether he has or has not, under the circumstances which I am about to represent, made a valid will and testament?

My Lords, I collect from these papers that it was (if I may take the liberty to mention it) the opinion of counsel, that he had made a valid

July 27. 1821. will and testament; and your Lordships are also in possession of the fact, that the Court were unanimously of the same opinion. These circumstances make it the duty of those who are bound to advise your Lordships, to consider the case with great attention, and I have not failed to endeavour to discharge that duty. But I am prepared to state to your Lordships, according to my humble opinion under the circumstances I am about to represent, that he has not made a valid will and testament.

My Lords, your Lordships will find that this gentleman, upon the 8th of September 1803, made a will, (for it certainly was a will,) in which he states himself thus. [His Lordship then recited the terms of the will.] Then, my Lords, he concludes his will thus; and I call your Lordships' particular attention to this, because I apprehend that, with respect to a will of personal estate, if there are any formalities observed beyond those which the law requires, the law is, that a man may prescribe to himself the forms which shall or shall not be attendant to his will. In this part of the island, your Lordships very well know, if a man makes a will of personal estate—if I were to begin, I John Lord Eldon do so and so, whether there was any signature or not, that would be a very good will. But I apprehend, if I thought proper to conclude that will by saying,—in testimony thereof to this my will, I do hereby set my hand and seal,—that it would be taken, according to our principles of law, to be a declaration of my intention as a testator, that the instrument so authenticated is to be a will, and to be taken to be a will, according to the forms which I myself have prescribed to observe. If, indeed, I were cut off in that moment by sudden disease, before I could annex my seal, or before I could annex my handwriting, the will would do; but if it was my professed intention, on the face of the will, to have certain forms and ceremonies as attesting my execution of the will, and my intention that the will shall not be perfect till I have observed these forms, then (unless my inability to do it is produced by some such circumstance) I apprehend the will would not be mine; though it would be mine, if I had not made any declaration as to such (for my purposes) necessary forms and ceremonies. Now, this testament concludes thus: 'In testimony of this being my last will and testament, I hereby set my 'hand and seal, and declare it to be written upon three pages, and 'signed in my own handwriting, at Edinburgh, this 28th day of September 1803.' It is then signed 'James Nasmyth;' and it is insisted (and I confess, according to my conviction, it is perfectly true) that there was a seal annexed to this will.

My Lords, I do not know how to make myself intelligible to your Lordships, without holding up to you the paper itself, because I must admit that the seal is not so approximate to the handwriting as it usually is in such instruments. Here is James Nasmyth, (pointing to the paper.) Here, it is represented, was the seal. The paper forms a representation of the will itself, and if ther was a seal—here it is—a seal

not taken off by tearing, but by excision, or cutting the part. Now, according to my humble judgment, if I am asked the question, whether there ever was a seal here or not, I cannot try it by any criterion that is better adapted, I think, as a rule by which you are to decide such a fact, than by taking notice of the circumstance, that the testator has expressly said, that as a testimony that this should be his will and testament, he does set his hand and seal to it. Then are we to suppose that, because the seal happens not to be quite so approximate as it is usually to the signature, that the testator did not do that which, upon the face of the instrument, he expresses his intention to do, and which in all probability he must have done. July 27. 1821.

My Lords, your Lordships will permit me now to observe, though there is a great deal of dispute with respect to matter of fact between these parties, as to the nature of the custody in which this paper was found, that, at least in my judgment, it is not very material to decide these questions of fact in controversy, one way or the other. It is said, and the truth may be—but I desire it at least may be understood that I for one form no opinion upon that circumstance, as being or not being true—it is said this paper was found in a closet, hung upon a peg, and there is a representation in the instrument, with a view to show your Lordships what part of the paper touched the peg; and it is contended, on one hand, that his having so treated this paper as to suspend it on that peg, is evidence that he did not mean that this should be his will. My Lords, I think it right, in order to discuss this question upon the principles upon which, at least as it appears to me, it ought to be decided, to assume that this paper was in (what I see in the papers before us is called) a fast-locked place of the testator; and whether the paper was found in the bureau of the testator, or upon this peg, I do not trouble myself to examine. That it was found in a closet where the testator had his valuable papers, I think is a fact beyond all controversy; and with respect to the particular circumstances under which it was found in that closet, I do not enter further into the examination of them, because I think it must be admitted that it was found, somehow or other, in a fast-locked place of this testator; and I found on that for another reason, that I take it, according to all principle, that if a paper cancelled, and the seal cut off, or the name erased, is found in a fast-locked place of the testator, the primâ facie inference from that is —not that the testator meant it should continue to be his will—but that the testator was the person that did that act himself, which is found to be evidenced by the state of the paper found in his fast-locked closet.

My Lords, at some period—at what period I know not—the testator took up this paper, and with a pencil he struck out and introduced several words which occurred in the instrument when it was first formally executed; and I take notice of this circumstance now, because it appears to me, that when it was argued that by the law of Scotland signature alone would be sufficient, even if that is required to authenti-

July 27. 1831. cate a paper as his will, I desire to ask, to what part of the paper, as we now find it, is that signature affixed? Is it affixed to what was the original writing in the paper, or is the signature to be considered as also affixed to the introduced new contents of the paper? I apprehend that no man can rationally say that this signature is to be taken as a signature, which was to be by relation drawn down to the authenticating the introduced innovated contents of the paper, but that it was a signature which was originally affixed as part of those forms and ceremonies which, as his law with respect to making the will and testament, he had prescribed to himself.

Now, in the first place, your Lordships will recollect that the second person named as an executor was John Gordon. That is struck out with red ink. I was about to introduce an observation, thinking it had been in pencil, which it may be proper to make. I do not apprehend it would signify at all, if it was clear on the contents of the paper that the testator meant that the whole of them should operate as testamentary, if it was found that some were in ink and some in pencil. But, on the other hand, I take it to be a material fact, when you come to consider whether the testator meant to alter his will, and if he meant to make material alterations, even if signature were necessary, whether it is likely, if he meant it to be a perfect act, he should introduce those alterations in pencil or in ink. It is a circumstance of evidence as to what was his intention.

My Lords, after Dr. James Hare, he strikes out the words 'late from India,' and inserts the words 'of C——— Hall, sen.' After the words 'Mr. Samuel Williamson,' he strikes out the words 'St. Andrew 'square.' He continues to John Gordon the legacy of £200 sterling, though he struck out his name as an executor. He continues the bequest to Samuel Williamson of £200 sterling, and with pencil strikes out the words, 'and remit what he owes to me.' That might be, and is a material alteration; because, if the debt was a considerable debt, it was in truth a gift of the amount of the debt, and would operate as a legacy of what he owed him; and then, after the words 'James Clark' with a pencil, he strikes out the words 'of Calcutta.' After the words 'determination of my executors and,' he inserts the word 'extra;' and then, after the words 'the remainder of my property,' he inserts in pencil 'personal and real;' and he puts at the bottom, in pencil, by way of describing the Bible, 'the folio Bible containing the family's 'names.' These interlineations he makes in pencil, and that in a paper which he professed to execute as a will, by affixing a signature and seal to it; and these interlineations appear in a paper from which the seal is abstracted by excision.

My Lords, this paper has on the back of it 'Will of James Na-'smyth, September 1803'—a will which, I have before observed to your Lordships, certainly was, at the time, a complete will, to be consummated by the death of the testator. Then he says, in pencil

again, 'See my several memoranda for a new disposition to be done 'forthwith; for she has gone as far as she can, and I must use the 'remainder as well and usefully as I can, generally and to public 'beneficence, recollecting that is left is freely given by my God and 'benefactor.' And this is dated 'January 1810.' This proves that between 1805 and 1810 there had been several memoranda for a new disposition; and here it must be admitted, that a man's making memoranda for a new disposition is an act that he may do quite consistent with his intentions that the old will should remain a will, to operate in case he did not make a new disposition. But the question will always arise, whether the memoranda, and the acts which he does, and the change of circumstances, and so on, amount to evidence—not merely that he meant them as memoranda that he would make a new disposition—but that he had come to a determination that the old disposition should not operate; and while yet meditating a new disposition, the hand of death cuts him off from making a new disposition, and he dies intestate. July 27. 1821.

My Lords, there is at the bottom of this these words, upon which stress, I see, has been laid—and much stress I have heard laid upon it—'Be sure to destroy this after writing the other, N. B.' And it has been contended upon this, that the old will was to remain in efficacy till the other was written; but the words are certainly open to another sense, because look at the word 'destroy.' A will may be revoked, a will may be cancelled, and yet the will may not be destroyed—that is, the visible existence of it may not be destroyed. As a will it may be destroyed, but the thing itself may not be destroyed; and when he speaks of several memoranda for a new disposition, and after the other is written, the question is, Did he preserve this as memoranda to himself or others to make a new disposition? or did he mean that the old will, together with or without the interpolated parts, and those memoranda, were to continue as instructions to enable a person to make a new will, and then to be destroyed, as putting an end to its existence after that will had been made?

My Lords, in July 1810 he writes, as I understand, he means to appoint 'William Kerr, secretary to the General P. O.'—which I suppose is post-office, or some such thing. Now, if you take that by itself, it is very difficult to know what the meaning of it was; but if you look back into the paper, and attend to the alterations that he had made in the paper, you will then find that the probability is, that he meant to appoint that William Kerr in the room of John Gordon. But the memorandum July 1810 to appoint William Kerr is not an appointment of William Kerr; and therefore striking out John Gordon, and making this memorandum to appoint William Kerr, certainly goes the length of showing that he did not mean that this former paper should operate as a will constituting John Gordon executor, although he does not proceed to execute his purpose to appoint William Kerr executor.

My Lords, this was in July 1810, and there comes another paper

July 27. 1821. in July 1811, which has been throughout this case called a codicil; and if the testator had thought proper to say that this was a codicil to his will, to be sure it would have been very strong as evidence to show that he thought he had a will. But there is no such thing as any denomination of that kind given by the testator to this thing called a codicil, and it seems to me to be extremely difficult to say that anybody can with propriety give it that denomination. This gentleman, who has spoken of memoranda, (those memoranda could not be alluded to by a paper written long before this paper,) says, 'J. N. directs that his third of the 'property of Whitehill and Craiglay be sold soon after his death, and 'the amount he gives and bequeaths to the Magistrates of his native 'town, Kirkcudbright.' Now, if this was real property, the testator could not possibly imagine that could be a complete will. 'The interest 'only to be applied by them to relieve the native poor of that place, 'prudently and judicious, and the principal sum to be placed at interest 'on the safest landed security.'—'J. N. appoints as one of his execu-'tors William Kerr, secretary of the General Post-Office, with a legacy 'of 100 guineas, which sum must also be given to Samuel William-'son.' My Lords, it is true that the words which follow Williamson, namely, 'one of my executors,' detract from the force of the observation in some degree which I am now about to submit to your Lordships; but I cannot think they detract sufficiently from the observation I am about to make, to induce your Lordships to think that the will signed by him September 1803 was a subsisting will for giving to Mr. Kerr a legacy of 100 guineas. He says, 'Which sum must also be given 'to Samuel Williamson, one of my executors.' The question is, whether he meant by this to say, that he had already appointed effectually, and by an appointment that was at that moment effectual, Samuel Williamson to be one of his executors; or whether he meant by this only to say, that Samuel Williamson should be one of his executors in a regular disposition? Now, when your Lordships turn back to the paper, he could not mean, when he here speaks of giving Samuel Williamson one hundred guineas, that the former paper was to be part of his will, when he had there given that same Samuel Williamson two hundred pounds, and remitted what he owed him. And here arises a question upon the simple contents of this paper alone, as they relate to Samuel Williamson—a question of very much the same nature as relates to the whole contents of the paper taken together; for if the original will is to stand, and this is also to stand—if, because he left the signature remaining, the original will is still to stand—I ask, then, was the signature affixed to this paper after he had struck out the words 'remit what he owes to him?' No man can say that the original signature was affixed to the paper after those words were struck out, because those words must have been struck out after the original signature was put to the paper. Then, is Samuel Williamson to have £200, £100, or is he to have the debt remitted or not? It seems to me that is

very strong to show that the testator was meditating a future will, and not acting on the will he had made. Then he says, 'J. N. gives and 'bequeaths to the only son of his late brother Thomas N. by Mary 'Sarah, or Sarah Mary Nasmyth, the sum of one hundred guineas, 'regretting the insuperable prejudices against him which he and his 'wife have instilled into their mind, manifested by their behaviour to 'him;' and he signs this with his initials. Now, without entering into the question, whether a testator, beginning his will with initials instead of his name at length, and concluding his last will with his initials, would or would not make a good will in the Scotch law, which I do not look to, you are to look to all the acts of the man together, to determine what he intended to do; and it seems to me the most improbable thing in the world, that this man, who had so formally executed the first will, should mean, by an instrument of this kind, to introduce alterations in that first will, and to introduce new bequests and new gifts with so little of formality as is contained in this paper. July 27. 1821.

My Lords, these are the instruments which this testator made—I mean which are found in this testator's repositories; and the question now arises, whether these papers, or any and which of them, are to be taken to be the testamentary disposition made by Dr. James Nasmyth? It should be mentioned to your Lordships, that some of the persons, one particularly, a favourite object with him of his bounty, as appears by his will, had died. It appears also that he had had a great accession of fortune; that therefore, both with respect to the objects of his bounty, and with respect to the quantum of bounty he could give, he was in a very different situation in the year 1811 from what he was in the year 1803. These have been called slight circumstances. I agree they are not conclusive circumstances; but I never can agree that they are to be considered as slight circumstances, when they are connected with the serious fact, and the substantial fact, of excision of a seal. They are circumstances then to be attended to.

Now, my Lords, it appears therefore to me, first, that a will had existed in a sealed state; secondly, that no seal was appended to the instrument when it was found. I am also satisfied that the seal was taken away by excision; and it appears to me also that this excision is primâ facie to be taken to be an excision by his own act, and that, according to the principles which you apply to cases of this sort, the circumstance that it was found in his own custody, and in a place of security, and with this excision, is to be taken as evidence that it was his own act. I have before said, that there is nothing in our law—I have not been able to find that there is any thing in the Scotch law—which requires the ceremony of sealing to make good a will of personal estate; but I do conceive it to be an universal principle in respect to wills of this sort, that any person may prescribe to himself terms and solemnities with respect to a will of personality beyond that which the law requires him to observe, and that it appears in the body of the instruments that he has

July 27. 1821. required—that he has said—that in testimony that this shall be his will, or as testimonies that this shall be his will, he does seal as well as sign it. Signature alone will not do. He has prescribed a law for himself, and it never can be according to principle, that this person who primâ facie has in the first act prescribed to himself both those solemnities, can notwithstanding be considered as meaning, that if he takes away the evidence of one of these solemnities, although the other would be sufficient, if it had been originally the only solemnity, are you therefore to infer that what he meant originally he no longer intends, and that he has altered that intention without making a memorandum of it.

My Lords, if he might make a will for himself, I say that he has withdrawn the testimony which he had before prescribed, as a testimony which was to appear before it could be declared that he had a valid will. That is, in my judgment, his declaration that that instrument should have no longer that testamentary effect and character. My Lords, do not let it be understood from this that I mean to say, that excision excludes all evidence of the contrary; but I say this—excision is primâ facie evidence that he did not mean that this should operate as his will, and that it rests upon those, who are to maintain that it operates as his will, to show that, consistently with that fact, he meant it to operate as his will; and a very difficult thing it is indeed to state why, if he did mean this to operate as his will, he ever made that excision; for he would have left that as the testimony of the will being to operate which he had prescribed before, and there seems to be no reason that can be assigned why he should make that excision. Besides, when I look at the instrument itself, I see that excision—I see those alterations—I see the interlineations, innovated parts, with respect to which the signature cannot be said to apply;—and further, I see this last paper, which goes a long way to show that it could not be itself aptly denominated a codicil; and, on the other hand, it contains matter to show, that though this person meant this instrument should operate as a testament while he was writing that last paper, he did not mean to consider that it was an operative testament at that time.

Upon the whole, my humble opinion is, after very anxiously considering this case, that it was the intention of this testator to make a new will. I guard myself by saying, that it is not enough to show that he had an intention to make a new will; but the evidence that proves he had an intention to make a new will, proves also want of adhesion to his purpose that the original instrument should continue to operate as a will—that it was his intention to make a new will, in the making or construction of which the papers were preserved, not as testamentary instruments, to operate if he died before, but as papers to assist him or his man of business in making the will; and that he has disappointed his own purpose as well as the objects of his bounty, as men do in other cases, by not recollecting that they may be called out of the world before they execute the purpose they may have formed. Upon the whole, I

cannot agree—(however diffidently I ought to conceive of my own opinion in a case circumstanced as this was)—I cannot honestly bring myself to say that this is a will; and therefore, under such circumstances, I must offer to your Lordships my opinion that the interlocutors should be reversed. If that should be your Lordships' opinion, then the proper judgment would be, to 'Reverse the interlocutors under their several 'dates, and to find that the instrument of the 28th September 1803, 'produced as the last will of James Nasmyth, was revoked and annul-'led by him, and that the several indorsements thereon, together with 'the paper produced and insisted upon as a codicil thereto, are of no 'avail or effect in law as testamentary dispositions: And it is further 'ordered that, with this finding, the cause be remitted back to the Court 'of Session in Scotland, to do therein as shall be consistent with such 'finding, and as shall be just.' July 27. 1831.

Lord Redesdale.—My Lords, after what has fallen from the Noble Lord, I shall trouble your Lordships with a very few words. I wish to express my full concurrence with what has fallen from him. My Lords, the instrument that is dated in 1803, and which the Court below has conceived to be a testamentary paper, is unquestionably mutilated. My Lords, it is mutilated in two parts. It is mutilated by tearing off the seal; and it is mutilated by an obliteration of the name of John Gordon, which is evidently so obliterated, as to make it difficult to discover what the name originally was—intentionally obliterated, so that it should not appear what the name was; but that it was the name of John Gordon, is still apparent upon a close inspection of the instrument, and from observing that, in a subsequent part of the instrument, where a legacy of £200 is given, he is called the said John Gordon.

Now, my Lords, the Court below has conceived that the mutilation of the name of John Gordon has so far revoked the instrument, that he is no longer to be considered an executor. The alteration that has been made in the instrument, by tearing off the seal, has taken from the instrument one solemnity with which the testator himself had declared he intended to authenticate the instrument. That being the case, it is to be inferred that it was taken off for some purpose; and for what purpose it could be taken off, except for the purpose of cancellation, I think it is extremely difficult to discover. That unquestionably might be rebutted by other distinct evidence; but, on the contrary, the whole of the evidence that exists in this case tends to show that it was taken off with the intention of rendering the instrument inoperative. It is perfectly clear that the changes that had been produced in the circumstances of this testator, not only induced his mind to apply itself to the making of a different disposition, but that his mind was so applied. The first is a memorandum to which there is no date, but which apparently was written previously to another of March 1809. The first memorandum is the necessity of making another will after such unexpected changes—

July 27. 1821. who to be executors. It is evident, therefore, that, at the time th memorandum was made, the mind of the testator was doubting upon th important subject, who were to be the executors of his will. On the ne page of the same book, where this memorandum is, and these memo anda are clearly referred to by the instrument of 1803, 'To make 'note of a new will before going to London, March 1809.' Now my Lords, it strikes me that these words, 'a note of a new will,' de monstrate clearly what he meant by all the different notes, that he di mean that they were to be notes for a new will, and not in themselve testamentary. He then, in a memorandum of the 29th January 1810 says, 'In pursuance of page 6th, to settle considerable sums on publi 'institutions, whether to be more generally beneficial, or less individu 'ally?' Then he expresses an intention to give Whitehill and Craigla to the Magistrates of Kirkcudbright. But the deed ought to be so accurately, legally, and distinctly drawn, that others shall not be able to touch it. He was aware, therefore, that that disposition could not have effect by a simple memorandum executed by himself without proper legal terms; and it is evident from another memorandum that he conceived it would require great care and attention in having an instrument properly framed that should dispose of that property; and that is material to consider with a view to that which is now called a codicil, and which begins with a disposition of the property of Whitehill and Craiglay, which, it is evident, Dr. Nasmyth himself knew could have no operation in the form in which it there appears.

My Lords, the indorsements which are contained upon the instrument of 1803 are also material to be attended to, because they strike my mind as showing, that he could not have conceived that the instrument upon which he made those indorsements was to be the instrument disposing of his property. He says, 'See my several memoranda for 'new disposition (this is in pencil) to be done forthwith; for she ha 'gone as far as she can, and I must use the remainder.' Then this dated January 1810; therefore either written at the same time, nearly at the same time, with the memorandum which is in another paper dated January 29. 1810. Now, that memorandum of the 29 of January 1810 relates to settling considerable sums on public institutions, and to the disposition of Whitehill and Craiglay to the Magistra of Kirkcudbright. He adds, 'Be sure to destroy this after writing th 'other.' Now, by the word 'destroy,' did he mean cancellation, did he mean something more? By the word 'destroy,' it seems to that he cannot be taken to have simply meant *destroy*, so that it sho not have effect as a will, though it should remain in existence; but, the word *destroy*, he meant that it should cease to have existence that it should not appear what the disposition was that he had made this instrument.

Then, my Lords, it is perfectly consistent with the fact of his havi previously cancelled the instrument, and it rather tends to confirm th

by tearing off the seal, he meant to deprive the instrument of operation as a will; and that he meant, at a future time, to destroy it as a memorandum, that it should no longer be in existence to show what had been his intention at the previous time; and it may be extremely probable that things passed in his mind which would render him anxious that it should not exist, particularly with respect to what he says of his brother Dr. Thomas Nasmyth, for it is impossible to read that disposition in favour of Dr. Thomas Nasmyth of the Bible, without perceiving that that was written in great bitterness towards that brother. July 27. 1821.

My Lords, in July 1810, he puts this memorandum, 'to appoint 'William Kerr, Sec. to the General P. O. instead of,' &c. He did not, by this, express that he had appointed him, but that he meant to appoint him by some instrument to be subsequently executed. The whole evidence, therefore, that is before the House upon the substance of this instrument, tends to show that he had conceived a complete intention of substituting a new instrument instead of this instrument; and that this instrument should not operate, when that new instrument was completed, certainly cannot be doubted. But then, having done an act which amounted to a mutilation of the instrument, and showing his intention, that, if he completed a new instrument, this instrument should not have its operation, it seems to me to be clearly inferred that the mutilation was done with the intention of cancellation,—that is, that the instrument should have no effect as a disposition, that it should remain only as a note or memorandum of what he was to do when he thought fit to make a new testamentary disposition of his property.

My Lords, with respect to the instrument which bears date in July 1811, that, I think, can be taken only as notes for a will, and not as a testamentary disposition. If it had been found alone without the other, nobody seems to have contended that it would have been a testamentary disposition, or that it would have been other than a note. The first words which it contains are: 'J. N. directs that his third of the pro-'perty of Whitehill and Craiglay be sold soon after his death, and the 'amount he gives and bequeaths to the Magistrates of his native town, 'Kirkcudbright.' Now, my Lords, he had a perfect knowledge that that could have no effect as a testamentary instrument; a perfect knowledge of that, as appears by the memorandum which he had previously made with respect to the necessity of a different mode of disposing of that property, which was real estate. In the interlineations that he had made in pencil in the original instrument of 1803, he has added real to personal in the residuary bequest. It is clear, from the memorandum he then made, that he was aware that the real property which he then had could not pass by that instrument. In the instrument of 1811, he says, 'J. N. appoints, as one of his executors, W^m^ Kerr, Sec^y^ 'of the G. Post-Office, with a legacy of one hundred guineas, which 'sum must also be given to Samuel Williamson.' Why, my Lords,

July 27. 1821. can it be supposed that he meant that this instrument should act as a codicil to the other, having, by the previous instrument, given to that very Samuel Williamson two hundred guineas, and this instrument apparently intending to intimate that Samuel Williamson was to have, by an instrument afterwards to be executed, the sum of one hundred guineas, and that the same legacy is the legacy given to Mr. Kerr? Whereas, if it is to be taken as a codicil, it would operate as an additional legacy to the legacy of two hundred guineas which had been given before.

My Lords, observations also may be made with respect to the disposition which is made in favour of the only son of his late brother Thomas Nasmyth, when it is recollected that he gives him the sum of a hundred guineas, and he gives it him regretting the prejudice against the testator, which his brother (I fancy) and his wife have instilled into the minds of their children.

My Lords, taking this altogether, therefore, it is clear that the instrument was mutilated; that it was mutilated effectually, even according to the opinion of the Court below, with respect to the appointment of Mr. Gordon as executor; it was mutilated by tearing off the seal, which the testator himself had declared to be one of the ceremonies which he imposed upon the instrument for the purpose of giving it validity. And I apprehend that, whether he tore off the seal, or whether he tore off the subscription, it was immaterial whichever it was; if it was a ceremony which he had stated to be a ceremony which he conceived fit to be annexed to it for the purpose of giving it validity, by removing that ceremony from it, he destroyed its validity. According to all principles on which cases of this description have been determined, (not simply in courts in one part of this kingdom, but universally,) where testamentary instruments require no particular ceremony to be observed, the person who makes such an instrument may impose upon himself, by the terms of the instrument, certain ceremonies to be observed. It would seem that there would have been no doubt in the Court below that the tearing off the signature (which, however, was not necessary) would have been considered to make it invalid. The instrument of 1811 cannot, in the form in which it is conceived, set up the instrument of 1803, amounting to a republication of that instrument. On the contrary, it seems to me that it is of itself an evidence that the instrument of 1803 was considered by the testator as cancelled, because, if he had not considered it as any longer operative, the words, as to the legacy of Mr. Williamson, would be, 'I give him a hundred guineas instead of 'the two hundred guineas which I have given him by the will.' If he had used those words, he would, by those words, have set up the will of 1803; but not using those words, and expressing himself in this memorandum as if no legacy had before been given to Mr. Williamson, the consequence, I conceive, must be, that it is a strong evidence, from which it may be inferred that he considered the instrument of 1803 as

at that time cancelled. My Lords, it comes before the Court in the shape of a mutilated instrument;—having the shape of a mutilated instrument, the question for consideration is, with what intent was that mutilation made? If it was made with an intention that the instrument should have no longer effect, then it must amount to cancellation; and, taking all the circumstances together, it does seem to be clear that it was the intent of the testator, that, by tearing off the seal from the instrument, that instrument should no longer have effect as a disposition of his property, because it no longer had that solemnity which he himself had imposed originally to it. I therefore concur in what has fallen from the Noble Lord. July 27. 1821.

SHAWE, LE BLANC, and SHAWE,—J. CHALMER,—Solicitors.

(*Ap. Ca. No.* 38.)

W. and R. RUSSELL and W. MOFFAT, Appellants.—*Copley—Pollock.*
SHANNON, STEWART, and COMPANY, Respondents.—*Clerk—Cuninghame.*

No. 21.

Shipmaster—Charter-Party—Implied Insurance.—Held (affirming the judgment of the Court of Session,) that where a shipmaster had altered the voyage of a vessel specified in a charter-party, at the request of the freighters, and where the vessel was lost in the course of the voyage so altered, the freighters were, in the circumstances of the case, not liable, as insurers, for the value of the ship; but this without prejudice as to the question of their liability for freight.

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1ST DIVISION. Lord Gillies.

ON the 3d September 1810, Russell and others of Kirkaldy entered into a charter-party with Shannon, Stewart, and Company of Greenock, by which the former chartered the vessel called the William on a voyage 'from the Frith of Forth to St. 'Johns, Newfoundland, and from thence with a cargo to either 'Lisbon, Cadiz, or Gibraltar, a safe port within the Straits as high 'as Alicant, or to either Greenock or Liverpool.' By the charter-party, Shannon, Stewart, and Co. were to pay the freight of two loadings of the vessel in the course of the voyage, namely, the freight of a cargo of coals from the Frith of Forth to Newfoundland, and of a cargo of fish from Newfoundland, either to a port on the west side of the Spanish Peninsula, not beyond Alicant, or to those ports of Britain above described. A few days after the execution of the charter-party, Russell and others enclosed a copy of it to Robert Graham, the master of the vessel, in a letter of

July 27. 1821. instructions, in which they said, 'We refer you to the charter-'party for the terms of settling the freight, &c. as much of which 'you will no doubt remit from these respective ports as you can. 'When you have fulfilled all that is required by the charter, and 'if you discharge in Spain or Portugal, you will use every en-'deavour to procure a cargo or freight to a port in Britain or 'Ireland, preferring one to the west side of this island; but take 'what you consider most advantageous for the ship, and in every 'instance study her interest both in freight and disbursements. 'Do not neglect to write frequently; and, so soon as you have 'ascertained where you are to proceed to on leaving St. Johns, 'advise us, so as we may be able to write you to your port of 'destination, if necessary, and for our government in insurance.' The vessel arrived at Newfoundland on the 21st of October, and, on the 24th, the master wrote to Russell and others that bad advices had been received from Spain and Portugal, and that the party proposing to ship the fish intended, if the vessel could not be sent in safety to those countries, to load for Leith, which he considered a better market than Greenock or Glasgow. On the 30th, the master wrote to the agents of Russell and others that he had begun to load, but his destination was uncertain. In the month of November following, Shannon, Stewart, and Company communicated to these agents that the vessel was to sail with a cargo for Leith; and on the 12th, the master wrote to Russell and others that it had been arranged that he was to sail to Leith; and, on the 14th, he made an indorsation on the charter-party in these terms: 'It is 'hereby agreed between Robert Graham, master of the within-'mentioned brig William, and acting as agent for his owners, 'takes it upon himself to proceed to Leith by the north of Scot-'land, a port not mentioned in this charter-party, on the same 'terms as if direct to the Fairlie Roads,* being the wish of Shan-'non and Company, a branch of the house of Shannon, Stewart, 'and Company, Greenock, the charterers.' The first of the above letters was received by Russell and others on the 1st December 1810, the second on the 4th, and the third and fourth letters on the 6th and 7th of that month. To these letters, however, they made no answer, nor did they intimate to Shannon, Stewart, and Company that they objected to the proposed alteration of the voyage. On the 8th of December they wrote to their broker at Leith to get the policy of insurance altered, so as to

* In the Frith of Clyde.

permit the vessel to proceed to Leith; but from the intervention of a Sunday this could not be accomplished till the 10th. On that day information was received that the vessel had been totally wrecked on the 6th of December among the Orkney Islands, and the original policy having been held vacated by the underwriters, in consequence of the alteration of the voyage, Russell and others, at the distance of two months thereafter, intimated to Shannon, Stewart, and Company that they held them liable for her value. They, accordingly, soon afterwards brought an action before the Court of Admiralty for that value and the freight stipulated in the charter-party, and they also called the master as a defender. The Judge Admiral, after decerning in absence against the master, and detailing the circumstances, found, 'That although a 'master of a ship might, by strangers in a foreign port, unac- 'quainted with the engagements by his owners, or instructions 'received from them, be understood to be the authorized agent 'of his owners, and entitled to bind them by his contracts, there 'could be no such understanding by persons in a foreign port, 'who were not only acquainted with the contract entered into by 'the owners for the employment of the ship, and the correspond- 'ing instructions to and engagements by the master, but were 'actually parties thereto: That the copy of the instructions to 'Graham (the master) conferred no powers upon him to alter the 'charter-party, but enjoined him to fulfil it, and that the discre- 'tionary powers contained in these instructions were all to act 'after the engagement of the charter-party was fulfilled, and con- 'sequently Shannon and Company having been, through their 'partners in this country, bound by the charter-party, and per- 'fectly aware of its contents, could not consider the master of the 'William, as the agent of his employers, entitled to alter the so- 'lemn contract made by them, and by which his authority to 'make engagements for the ship was restrained: That, there- 'fore, the alteration on the charter-party is void and null; and 'that no notification of the intention to alter the charter-party 'was ever made by Shannon and Company, or by their partners 'in this country, the defenders, to the pursuers,—and that no 'notice of the intention to be relied on was given by Graham till 'his letter, dated 12th of November, arrived on the 7th of De- 'cember; and therefore, that there was no necessity, nor even 'opportunity, afforded to the pursuers for notifying to the de- 'fenders their dissent from the alteration of the charter-party, nor 'could the defenders have been any way benefited although they 'had received such notice: That there are no grounds for hold- 'ing that the pursuers, by endeavouring to cover by insurance

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July 27. 1821. 'the voyage to Leith, ratified in any way the alteration of the 'charter-party by the master, but that the same was honourable, 'and calculated for behoof of all concerned.' He therefore found them liable as the underwriters, and decerned against them for a certain sum as the value of the vessel, under deduction of that of the wreck. Of this decree a suspension was brought by Shannon, Stewart, and Company, and a reduction by Russell and others, (who were dissatisfied as to the amount decerned for). Lord Gillies, in the suspension, suspended simpliciter, and in the reduction assoilzied. Russell and others having represented, his Lordship, after alluding to the correspondence with the master, —that no disapproval of the intention there communicated had been made to Shannon, Stewart, and Company,—that Russell and others had attempted to insure the vessel for Leith, but that this had been prevented by information of her loss being received, found, 'That the representers proceeded in the mean 'time to act as if they had no claim against the respondents, 'and did not intimate to the respondents that they meant 'to hold them liable as underwriters on the ship and freight 'for the loss that had happened until after a lapse of some 'months, when the present action was raised both against 'Graham the master and the respondents, concluding against 'them as conjunctly and severally liable for reparation of said 'loss: That though the shipmaster, against whom decree has 'passed in absence, may be liable to the representers if they can 'show that he deviated from his instructions, and exceeded his 'powers in agreeing to proceed with the ship to Leith, yet that 'the respondents, merely because they entered into said agree-'ment with the shipmaster, who had been intrusted with the 'management of the vessel by the representers, are not liable to 'them for the reparation of said loss, the more especially as due 'notice was not given to them by the representers, that they, the 'representers, considered them as so liable.' His Lordship therefore refused the representation, and adhered to his interlocutor. Russell and others having reclaimed, the Court, on the 23d of January 1817, found, 'That the voyage covenanted in the charter-'party with the petitioners, the owners of the brig William, was 'unnecessarily and unwarrantably altered by the agreement of 'the 14th of November 1810, between the shipmaster and Shan-'non and Company, and so far they alter the Lord Ordinary's 'interlocutor reclaimed against. But with respect to the re-'mainder, and the final issue of the cause depending on the con-'duct and proceedings of the parties, after notice received of the 'resolution or purpose to alter the said voyage, the Lords

'being equally divided in opinion, they supersede further advis- July 27, 1821.
'ing of the cause for the opinion of Lord Gillies.' Thereafter, on the 31st of January, (Lord Gillies being on the bench,) they altered the interlocutor, found the letters orderly proceeded, and decerned in terms of the summons of reduction, and of the petitory conclusions therein contained. Shannon, Stewart, and Company having reclaimed, the Court were again equally divided, and Lord Gillies having been called in, they, on the 19th of June 1817,* altered, and in the reduction assoilzied, and in the suspension suspended the letters simpliciter.

Russell and others then appealed to the House of Lords, on the ground, 1. That the master had no power to alter the terms of the charter-party, which had been solemnly executed and acted on by the parties; and, 2. That, in the circumstances of the case, there was no foundation for alleging that they had either homologated the act of the master, or that they had been guilty of negligence in not communicating their dissent from the intended alteration of the voyage. To this it was answered, 1. That the agreement by the master to change the destination of the vessel was within the special powers conferred upon him by the letter of instructions; 2. That, even although he had not possessed these powers, yet, as he was the servant or agent of Russell and others, Shannon, Stewart, and Company could not be made liable for the error or fault of this person, the more especially as it was not alleged that they had either corrupted or deceived him in the performance of his duty; and, 3. That it was entirely attributable to the remissness, and want of punctuality, of Russell and others, when they first heard of a probable change in the home voyage, that any loss at all was sustained. The House of Lords found, 'That, in the circumstances of this case, the defenders Shannon, 'Stewart, and Company were not liable to make good any loss or 'damages sustained by reason of the alteration of the voyage or 'destination of the chartered vessel, as specified in the charter-'party; but this is without prejudice to the question as to 'freight: And it is therefore ordered and adjudged, that the 'interlocutors complained of, so far as they are consistent with 'this finding, be affirmed: And it is further ordered, that the 'cause be remitted back to the Court of Session, to review the 'interlocutors complained of, having regard to this finding, and 'also as to the demand of freight; and after such review, to do 'therein as to them shall appear to be just.'

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* Not reported.

July 27. 1821. *Appellants' Authorities.*—(1.)—Abbot on Shipping, 112. 119; Molloy, 381; Lawes on Charter-Party, 63.

Respondents' Authorities.—(1.)—2. Camp. Rep. 529; 6. Bro. Parl. Cases, 474.

REARDON and DAVIS,—J. RICHARDSON,—Solicitors.

(*Ap. Ca. No.* 40.)

ADDENDUM.

ELIOTT *v.* POTT, ante, No. 5. p. 16.*

LORD CHANCELLOR.—My Lords, there is another case which stands for judgment to-day, which has been argued in two Sessions of Parliament, the case of Sir William Francis Eliott of Stobbs, Bart., appellant, and George Pott, tacksman of the farms of Langside and Penchrise, respondent. There are two appeals. The appellant in the original appeal is the proprietor of an estate called Stobbs in the county of Roxburgh; and an action was brought in the Court of Session to set aside, for a violation of the provisions of the entail, a lease granted by the appellant's father to the father of the respondent Mr. Pott. My Lords, the restrictions which, it is supposed, prohibited the granting of that lease, are found in a deed which is conceived in the form of a bond of tailzie, executed in the year 1719; and it will be unnecessary for me to read to your Lordships the whole of the prohibitory, irritant, and resolutive clauses in that bond of tailzie, as they have been so frequently stated to your Lordships in the course of the discussion at the bar, and so very much observed upon.

My Lords, under this entail the late Sir William Eliott, father of the appellant, entered into possession of the estate. In the year 1790 he granted a nineteen years lease of the farms of Penchrise and Langside, which consisted of between four and five thousand acres of the estate, at the rent of £281. 8s., to Gideon Pott, the father of the respondent. After his possessing the farm four years under this lease, a new transaction was entered into between the parties. On the 20th of March 1794, Sir William

* This speech was not received till after the case was reported and printed, and is therefore given separately.

granted a new lease of the same farms to Mr. Pott, at the rent of £285, and for a period of seventy-seven years; there was a sum paid as a grassum,—namely, £2904: 15: 9; that is, £2904. 15s. 9d. was paid on the surrender of the lease of 1790, and the granting the new lease for seventy-seven years. Of even date with this lease, Sir William Eliott granted a back bond to the tenant, restricting the rent exigible during the lifetime of him, Sir William, to £200. Sir William died in May 1812; he was succeeded by the appellant, who found himself entitled, only if this transaction should be good, to a rent of £285, for farms which he represented as farms that ought to give a rent of £1500; and then he commenced the present action for reducing the lease as an infringement of the restrictions of the entail.

My Lords, the action came first before my Lord Gillies, and the respondent's defence consisted of two propositions: He first maintained that the irritant and resolutive clauses of the entail were so loosely, so inaccurately, and so incomprehensively worded, as to render the entail unavailable against third parties contracting with the heirs in possession of the estate; and, secondly, that even supposing the irritant and resolutive clauses to be effectual to the extent of the acts of contravention therein enumerated, they could not invalidate the lease under discussion, because that enumeration, while it mentioned the act of disponing, omitted that of alienating, under which alone, in the absence of any express limitation of the power of leasing, it was insisted that the lease could be struck at as contrary to the restrictions of the entail. The Lord Ordinary, having heard the counsel for the parties, repelled the reasons of reduction, assoilzied the defender from the conclusions of the action, and decerned. This was upon the 27th of January 1813; so that in effect, by this interlocutor, whatever ground there might be for saying that a lease or alienation was subject to objection, he was of opinion there was no ground for sustaining that allegation.

Upon the 19th of February 1813, a short representation was given in by the appellant, and refused, without answers. Upon the 17th of December 1813, after another representation had been given in, the following interlocutor was pronounced: 'The Lord 'Ordinary having considered this representation, with the an- 'swers thereto—Finds that the lease in question having been 'granted in consideration of a grassum, and for a period of se- 'venty-seven years, is to be considered as an alienation; and finds 'that alienations are prohibited by the entail of the estate of 'Stobbs; but finds that the irritant and resolutive clauses in the 'same deed of entail contain no reference to the specific prohibi-

'tion against alienating, such as is necessary to render the same 'effectual against third parties.' It is unnecessary for me to state, in the presence of your Lordships, that in order to make the prohibition effectual against third parties, there must be not only a clause prohibiting the thing to be done, but a clause rendering it null and void, and a clause resolutive in its nature, so that all the three clauses must strike the act complained of; and if the one does strike the act complained of, and the others do not, it would not be effectual as against third parties. This interlocutor was submitted to the review of the Court, and having been followed by answers, their Lordships pronounced the following interlocutor: 'The Lords having resumed consideration of this pe-'tition, and advised the same with the answers thereto, they refuse 'the prayer of the said petition, and adhere to the Lord Ordi-'nary's interlocutor reclaimed against; but find the petitioner not 'liable in the expenses of process.'

My Lords, there have been two appeals presented to your Lordships, one of them against that part of the interlocutor which represented the lease in question as an alienation, as having been granted in consideration of a grassum, and for a period of seventy-seven years; but with reference to that appeal, it appears now not necessary to take much notice of it, because, by many of your Lordships' decisions of late, such a lease has been considered as an alienation; and therefore, if the prohibitory, irritant, and resolutive clauses are sufficient to prohibit alienation, they must now, under the effect of your Lordships' decisions, be taken to prohibit such a lease as an alienation. With respect to the other appeal, the substance of it is, that if the Court held the bond of tailzie to be intelligible, they were not authorized in so holding it; and again, if they held it to be intelligible, but that the act which is to be taken as the alienation was not struck at by all the clauses, that they are wrong in so considering it, because the word *disponing* being in the other clauses, whilst the word alienate, and so on, is only in the prohibitory clause, that that word *disponing* is in law a word which includes in it all that would be expressed by *alienating*; that it is not to be understood as technically meaning merely disposition, but that it will include alienation; and therefore, if a lease for seventy-seven years, with a grassum, is an alienation, such an alienation is struck at by the word *dispone*, as much as it would be struck at by the word *alienate*, if the word *alienate* had been in all the clauses.

My Lords, it is a very remarkable circumstance, that this case has been twice decided by the Court of Session. In the year 1803, it appears from the report I have now in my hand, that

there was a cause in the Court of Session, Sir William Eliott against the Heirs of Entail of Stobbs. Your Lordships will permit me to notice, that being Sir William Eliott against the Heirs of Entail of Stobbs, it was a question inter hæredes; but being a question inter hæredes, instead of being a question as between strangers, does not appear to me to make any difference as to whether the deed of tailzie is intelligible or not; it may make a difference in the question put in another way. My Lords, this case, after stating the deed of entail of the 17th of September 1718, which is the deed of restriction now under consideration, stated that Sir Gilbert made up new titles to his estate, on the footing of this entail, in 1719 and 1720, upon which he and his eldest son were infeft. The entail was recorded in 1724, and Sir Gilbert possessed the lands upon these titles till his death in 1764. He was then succeeded by his eldest son Sir John, who possessed the estate upon the titles made up in his father's lifetime, and died in 1767, being succeeded by his eldest son Sir Francis, who also made up titles in terms of the entail; and, upon his death in 1791, Sir William succeeded, and made up his titles under the entail as his predecessors had done, on which titles he has ever since possessed the estate. In the year 1801, Sir William entered into a minute of sale with Mr. Joseph Gillon, writer in Edinburgh, of a part of the estate. Mr. Gillon suspended the payment of the price on this ground, that Sir William had no power to implement the minute of sale on his part, being restricted from selling by the entail of Stobbs. The bill of suspension was passed of consent. Then there arose another cause. Sir William brought actions of reductions and declarator of the tailzie and subsequent investitures, calling as defenders all the heirs of entail in existence. Your Lordships are aware that there is a mode of proceeding in Scotland which we do not adopt in this part of the United Kingdom; that is, that where persons conceive themselves entitled to certain estates, they bring an action of declarator, when no persons dispute it, against all those who may choose to oppose their claim; and there certainly is a great degree of convenience in this. The Courts of Scotland are very much attached to this mode of proceeding; whereas our Courts of Justice are very much in the habit, the moment they find that the proceeding is to settle a question of any kind which cannot be said strictly to have arisen between the parties, to refuse to give any decision whatever upon it. I believe I may venture to state, on my own recollection in practice, that now and then this House has been called upon to decide in similar cases, and has occasionally decided in similar cases. Formerly contracts used to be made for sales of estates.

Bills were filed in the Court of Chancery for the specific performance of the contracts, the intention and ultimate object being to bring the question before the House of Lords, to get a decision of the House of Lords, which, by the bye, could not bind others, though it would be a great authority as to whether the party had or not the right to sell. This appears to have been put an end to by another mode of proceeding, which began about the time of Smith *v.* Chapman, where Lord Thurlow decided, that if there was a case of considerable doubt with respect to a title, he would not compel the purchaser to take. Mr. Baron Eyre, afterwards Lord Chief Baron, and Lord Chief Justice Eyre, I remember, was a good deal shocked that there should be any such thing as uncertainty in the law, because he was of opinion there could be no such thing as uncertainty in the law; and he did not approve of that decision: But it has since been taken for granted, that if there is serious doubt of the title, whatever might be the law before, the Court will not compel the party to take the title, and so that mode of proceeding appears to have been very much discussed in our part of the kingdom.

It is unnecessary for me to state to your Lordships what the result of this action of declarator is, but in the process it is mentioned, 'Sir William maintained this separate plea, that the entail was ineffectual to prevent a sale, being defective in its various clauses, in support of which,' (and I will read the pleadings to your Lordships,) 'he maintained that the limitations of an entail are not to be extended by inference or implication beyond what is expressed in the entail itself,—(a proposition to which full assent will be given); and wherever these limitations are directed against third parties, as in the case of a prohibition to sell or contract debt, in order to render these effectual against purchasers or creditors, it is necessary that the prohibitory and irritant clauses should be accompanied by a resolutive clause making void the right of the contravener.' Then, my Lords, cases are mentioned. 'The irritant and resolutive clauses, besides, must be precisely applicable to the act of contravention, in order to be effectual against third parties.' Bruce of Tillycoultry's case is mentioned; then they say, 'In the present case, the irritant and resolutive clauses, instead of bearing in general that all the acts of contravention contained in the prohibitory clause shall be void and null, or shall subject the heir to a forfeiture, specially enumerate the various cases to which they are meant to apply.' That would be more accurately put if it was stated, that after the declaration that they are not to contravene in any respect, which is contained in the instrument, it enumerates various cases in

which they are not. 'That in order to render void an act of contravention, it must be done by Sir Gilbert and the heirs,—it must be done by the heirs during their respective marriages,—and it must be such as to burden or affect the estate, and impinge or alter the succession. But to enter into a minute of sale does not fall under any of the cases enumerated as qualified and explained by the irritant clause, in which cases alone contravention of the entail can be effectual against third parties. The prohibition to sell, analzie, wadset, dispone, dilapidate, and put away the said lands, is most ample; but in the irritant and resolutive clauses there is not one word about selling, nor any thing which, in sound legal construction, can be held to be equivalent to it.'—My Lords, whether there is any thing which can be held to be equivalent to it, is precisely the question. The only words having the least reference to this prohibition are those in the irritant and resolutive clauses, 'or *who*, whether male or female, 'and I shall dispone the said lands and estate, or any part thereof.' Now, the relative *who* refers to the nearest antecedent clause, heirs-female, their husbands and children, none of which Sir William is; at least, if it does not, this clause is so uncertain as to be insufficient for imposing fetters, which can only be done clearly and expressly to affect the rights of purchasers and creditors. Again, the disposition must be granted in concurrence with Sir Gilbert himself, 'who, whether male or female, *and I*;' and it can only take place in case they concur to dispone the estate, but does not take place in any of the other ways by which the estate may be alienated; *e. g.* by a minute of sale. The statute 1685 distinguishes between selling, analzieing, and disponing, as being different modes of affecting property. Selling or analzieing, therefore, by a minute of sale, is different from disponing, and the minute of sale may be completed by the purchaser adjudging in implement. My Lords, I read this, because it appears to me that the substance and marrow of the argument is contained in these pleadings.

On the other hand, the answer appears to me to contain the substance and marrow of all that has been stated at the bar on the other side. The act of 1685, permitting proprietors to entail their property, has prescribed no form of words which shall be essential for carrying the entailer's intention into effect, nor have the decisions of the Court as yet supplied the deficiency. It is only necessary that the clauses should be clearly and distinctly expressed, so that the meaning of the entailer may be carried into effect, without resorting to any constrained or violent construction of the words. In Bruce *v.* Bruce, 15th January 1799, the en

tail of Tillycoultry, among other prohibitions, contained one directed against selling, analzieing, dilapidating, or putting away the foresaid lands or estate. The resolutive clause did not contain a general reference merely to the various prohibitions as the irritant clause did, but proceeded to a special enumeration of the acts of contravention, which would forfeit the contravener's right, thus limiting and circumscribing the effects of the general reference. Among those acts of contravention the whole clause de non alienando was omitted, and no words which could apply to it were inserted. The strict interpretation of entails will probably not be carried farther than it was there. The present question, however, is one very different. On examining the enumeration of cases to which the irritant and resolutive clauses of the estate of Stobbs are meant to apply, the first part of them refers to the prohibitions with regard to the entailer's surname, title, and arms, and with regard to the heirs-female and their husbands and children using the same surname, title, and arms. Then, as the heirs of entail, as well as the entailer, were prohibited from alienating, contracting debt, or altering the succession, the next part of the clause,—quite distinct and independent of the former, and beginning, 'or who, whether male or female, and I shall dispone 'the said lands,'—relates to these last prohibitions. The irritant clause begins with the words, 'And if I or any of the said heirs, 'whether male or female, successive, shall contravene the pre-'mises;' and the remainder is merely a continuation of that sentence. The pronoun *who*, therefore, applies to any of the said heirs; and, particularly when connected with the words 'whether 'male or female, and I shall dispone,' it can relate to no others than the heirs of entail, as the heirs of entail, male and female, and the entailer himself, had been prohibited from alienation. Nor is the irritancy confined to a deed of an heir, in concurrence with the entailer; that depends certainly upon the whole extent and meaning and construction of the clause. The entailer, by the construction of the tailzie, became a liferenter, and no prohibition against him was necessary; and if he had not, he could not have irritated his own deed, or deprived his creditors of the means of attaching his estate, so long as he continued proprietor of it, so that the addition *and I* to the various clauses is unnecessary, and should be held pro non scripto. The intention of the entailer is obvious. Even the clause itself begins thus, 'If I, or any of 'the said heirs.' Afterwards, when *and* is used, it is used as being synonymous with *or*, which, in common language, it frequently is. Again, the irritancy is applicable to a sale of the estate, as disponing is one of the acts specially enumerated,

making this case thus far different from the case of Tillycoultry. Now we come to the words of the clause again. Selling, however, it is said, is not included under the general term to dispone. But these words are synonymous,—they are different modes of expressing the same act, and, together with analzie, are so used by the statute of 1685. Perhaps, of all the terms, sell, analzie, wadset, dispone, dilapidate, and put away, used in the prohibitory clause, *dispone* is the most general, and it is therefore used as an equivalent to them. I need not put your Lordships in mind what this House has found in other cases as to the effect of the word *dispone*. The question which arises is, not whether in many cases the meaning of the word *dispone* may not be to sell; but whether it is so in this case, taken in the way in which it stands here. The irritant clause continues, 'Then, and in any of these cases, not only shall 'all such deeds and contraventions to be done by me and the 'said heirs male or female,'—this first part applying to such prohibitions as are directed against the entailer or the heirs of entail; and then proceeds,—'or any of them, during their respective 'marriages,' comprehending the other class of contraventions as to the name, arms, and title which are to be borne by the heirs-female and their husbands, and which prohibitions are contradistinguished throughout every clause in the entail. All these are irritated, so far as they burden and affect the estate, which last term is sufficient to include the sale in question.

My Lords, Mr. Solicitor-General Blair and Mr. Ross were concerned as counsel in this cause; and the Court of Session were of opinion, which they expressed on the 19th of May 1803, both that this clause was intelligible, and that the word *dispone* in the irritant and resolutive clause was quite sufficient to support the entail. But it has been intimated to us, that we are to consider this a case of collusion. Now, I do not see how that is made out; for unless the Judges were colluding, I must look at it as containing their opinions in 1803. It is said this is not a res judicata between the parties. I agree that it is not a res judicata with respect to the respondent at the bar; but still it is the opinion of the Court of Session upon precisely the same points; and if they were to be of opinion a man cannot sell, they must be of opinion a man cannot buy. The question therefore, upon the whole, appears to be this, Whether the opinion of the Court of Session in 1803, or the opinion of the Court of Session in the present case, is the better opinion? It appears to me to be reduced to two points; namely, whether this deed is intelligible; and if this deed be intelligible, what is the effect of it with respect to the sufficiency of the three respective clauses. Now, my

Lords, it is a very dangerous thing to come to a decision that an instrument is not intelligible, which has been so far the subject of judgment; and though one cannot help seeing that almost every rule of grammar is sacrificed in this deed, yet, if we were to hold this to be unintelligible, I cannot conceive how it can be said to have been satisfactorily determined, unless it was understood. I am of opinion this instrument is an instrument capable of being understood, and that reduces it to the question, what is the effect of the word *dispone*, regard being had to the whole context of this instrument? After the decisions which have been come to upon the word *dispone*, (and your Lordships will pardon me if I presume to say, after what is of infinitely more authority, the great authority to be found in the law of Scotland, antecedent to any such decision as to the effect of the word dispone,) I cannot help stating it to your Lordships, after much consideration of the case, as my judgment, that this word *dispone* in these other clauses is quite sufficient for the purpose of protecting this individual; and unless any of your Lordships are of a different opinion, it does appear to me that this judgment must be reversed.

CASES

DECIDED IN THE HOUSE OF LORDS,

ON APPEAL FROM THE

COURTS OF SCOTLAND,

1822.

MURDO M'KENZIE, Appellant.—*Moncreiff—Skene.* No. 22.
DAVID ROSS and his CURATORS, Respondents.—*Adam—Cockburn—Maitland.*

Jury Court—55. *Geo. III. c.* 42.—An action of damages for trespass having been remitted to the Jury Court, and a view ordered—Held, (affirming the judgment of the Court of Session,) 1. That the viewers are to be selected from the first twelve of the jurors returned for the county where the property is situated, and the view to be taken, although lists for other counties belonging to the same circuit may have been delivered; 2. That a bill of exceptions is not a competent mode of objecting to these viewers acting as jurors on the trial; and, 3. That a motion for a new trial, founded on that objection, being refused, no review is competent.

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1ST DIVISION.
Lord Alloway.

M'KENZIE, the proprietor of the estate of Ardross situated in Ross-shire, brought an action against David Ross, the proprietor of the adjoining estate of Milncraig, alleging that the late David Ross, the defender's father, 'did frequently in his lifetime molest 'and interrupt the pursuer in the peaceable possession of his said 'lands and estate; and since his death, the said David Ross, now of 'Milncraig, and his factors and tenants, or others in his name and 'by his desire, and for whom he is answerable, without any warrant 'of law, or by the pursuer's consent, have been in the constant 'practice of troubling and molesting the pursuer in the peaceable 'possession and enjoyment of his said lands and estate: And par-'ticularly, the said deceased David Ross having purchased the 'said estate of Milncraig, comprehending the lands of Rosshill, 'and having erected a farm-house upon these lands, which are 'bounded by the pursuer's lands of Tolly, the said deceased 'David Ross did, by himself or others of his causing, illegally 'and unwarrantably break down the march-dike which divided

Feb. 15. 1822. 'his property from that of the pursuer, and forcibly make a pass-
'age through the pursuer's grounds from Taynauld to the house
'so built by the said David Ross upon the said lands of Rosshill:
'And although the pursuer has since at various times attempted to
'make up, and had actually made up, the march-dike so broken
'down, and enclosed his grounds in that quarter so as to prevent
'encroachment thereon, the said deceased David Ross continued
'during his lifetime, and since his death the said David Ross, now
'of Milncraig, and his factors and tenants, still continue most il-
'legally and unwarrantably to break down the said march-dike as
'often as the pursuer builds up the same, and to force their way
'through the pursuer's grounds, by keeping open a slap in the said
'march-dike, and also by breaking down another dike erected by
'him upon his grounds near the burn of Taynauld, to the great
'molestation and loss and damage of the pursuer and his ten-
'ants.' He therefore concluded that Ross ought to be ordained to desist from doing so in future, and be found liable in £2000 of damages. In defence, Ross denied the allegations in the summons, and averred that he had made use of no road through M'Kenzie's property, to which he had not a just right by his titles, and by the immemorial possession of his ancestors. After a condescendence and answers had been lodged, the case was remitted to the Jury Court, where the following issues were prepared, and afterwards approved of by the First Division of the Court.

'Whether the road leading from the pursuer's property of Tay-
'nauld to Rosshill-house, the property of the defender, was first
'made in 1796 by the defender's father breaking through the
'march-dike that separates the defender's property from that of
'the pursuer: And the pursuer having endeavoured to put a stop
'to the said encroachments, by rebuilding the march-dike or other-
'wise, Whether the defender, by himself or others acting in his
'name, and for his behoof, had broke down said dike as often as
'it had been rebuilt, and continued the said encroachment on the
'pursuer's property by using it as a road, to the loss and damage
'of said pursuer: Or whether the said road has been used as a
'public road from time immemorial.' The trial was appointed to take place at Inverness, and precepts were issued to the Sheriffs of Inverness, Ross, Elgin, Cromarty, and Nairn, to have the requisite number of jurors in attendance. These precepts were duly executed; and it being considered necessary that a view of the ground should be taken by some of the jurors, and the parties being unable to agree as to the persons who should so act, the clerk of the Jury Court, in terms of the 29th section of the 55. Geo. III. cap. 42, issued a precept to the Sheriff of Ross to cause the

six jurors first named in his list to attend and officiate as viewers. These persons accordingly attended, and they were shown the lands by M'Kenzie, and others who had been nominated to act as showers. When, however, the case came on for trial at Inverness, and it was proposed to swear five of these viewers as jurors, he objected that they had not been authorized to act as viewers in terms of the statute; because by the above section it is enacted, 'That if the parties cannot agree, six or more of the first 'twelve on the list of jurors returned by the Sheriff, Steward, or 'other officer or officers as aforesaid, shall have the view, and shall 'be first sworn, or such of them as shall appear upon the jury to 'try the issue before any drawing as aforesaid;' that the viewers ought to have been taken from the list returned by the Sheriff of Inverness, whose list must be held (according to the practice of the Court of Justiciary) to have been the first in order; and that it was therefore incompetent to take the viewers from the list delivered by the Sheriff of Ross-shire. To this it was answered, that there was no rule by which the list of the Sheriff of Inverness could be considered as the first in order; that a precept to him to summon the viewers would have been unavailing, because he could not have compelled them to go into the county of Ross, where the lands were situated; and as the viewers had been taken from the first six in the list returned by the Sheriff of Ross, the statute had been duly complied with. Lord Pitmilly, as Lord Commissioner, having repelled the objection, and declined to sign a bill of exceptions which was tendered by M'Kenzie's counsel, the viewers were sworn as jurors. The jury having returned a verdict, declaring that, 'in respect of the matters 'of the said issue proven before them, they find for the de-'fender,'—M'Kenzie made a motion in the Court of Session for a new trial in respect of the above objection, and that the verdict was contrary to evidence. He at the same time made a similar motion in another case which had been tried between him and Ross on the same occasion, and where the same objection had been stated by him.* The Court appointed counsel to be heard on both of these motions; and after hearing them as to that in relation to the other case, they 'refused the motion for a new 'trial, and declared the verdict conclusive.' M'Kenzie then allowed the motion in this case to be dismissed, and moved the Jury Court to appoint the bill of exceptions to be signed by Lord

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* See the next case.

Feb. 15. 1822. Pitmilly. This was refused as incompetent;* and the process having been transmitted to the Court of Session, the Lord Ordinary, in respect of the verdict, assoilzied Ross, and found him entitled to expenses. Against this interlocutor M'Kenzie offered a representation, but the Lord Ordinary refused it 'as incompetent;' and the Court, on the 1st of June 1820, adhered.† He then appealed to the House of Lords, on the ground, 1. That the viewers had not been appointed in terms of the statute; 2. That Lord Pitmilly ought to have signed the bill of exceptions; and, 3. That if the objection to the viewers was well founded, they were objectionable as jurors, and the case must therefore be considered as if no verdict had been returned. To this it was answered, 1. That the objection was finally disposed of, in terms of the statute, by the motion for a new trial being dismissed, and by the verdict being applied; 2. That the objection was in itself unfounded, and was inconsistent with a fair and proper interpretation of the statute; and, 3. That the bill of exceptions was incompetent, because it did not apply to a proceeding pending the trial, but to one which was necessarily preliminary to it. The House of Lords 'Ordered 'and adjudged that the interlocutors complained of be affirmed, 'with £100 costs.'

The Lord Chancellor, after mentioning the nature of the summons, and subsequent procedure, observed:—My Lords, before I proceed to state further to your Lordships what has taken place in this case, your Lordships will allow me to say, that I entirely agree in what has been stated from the Bar, that as this is the first case which has come before us with reference to the proceedings of the Jury Court in Scotland, it is a case that deserves great attention. But, my Lords, I cannot agree with any proposition, (if such proposition be meant to be stated,) as that we are therefore to give relief in this case beyond what is given by the statute. The later statute, indeed, can hardly be said to apply to this case, for it did not pass until 1819. I think we are to take care to give relief according to our legal power of giving relief; and if any relief is asked of us, which the powers belonging to us as a Court of Appeal do not authorize us to give, it is not on account of any

* See 2. Murray's Reports, p. 20, where it is stated that the ground of the refusal was thus explained by the Lord Chief Commissioner: 'We must refuse this application, 'as it relates to a matter preliminary to a trial. If granted, it would be set aside in 'the House of Lords for irregularity, a bill of exceptions not being the remedy for such 'a proceeding. It is like an objection to the notice or summons of a witness, which may 'occasion what is termed a mis-trial, the remedy for which is not a bill of exceptions, 'but an application for a new trial.'

† Not reported.

desire we may have to increase the powers of the Jury Court, that we can give them further power. It is our duty to act according to the law, to the extent of those powers:—to that extent we ought to give relief; but beyond that we cannot go. Feb. 15. 1822.

My Lords, in the first attempt to apply the trial by jury to Scotland, it was thought infinitely too hazardous to infuse the whole of the English law of trial by jury into Scotland, and that it would be better to do it by degrees, than to introduce at once the whole of a subject that could not be immediately, fully, and well understood; and great care was taken by those who composed this act in the year 1815—or rather, I should say, by those who drew this act in the year 1815—great care was taken to avoid the mischief that might result from dilatory proceedings.

My Lords, the first enactment of the act I have in my hand is, that as soon as his Majesty shall appoint Judges to form a Court for the trial of issues in civil causes, where matters of fact were to be proved, either Division of the Court was empowered to order and direct, by special interlocutor, such issues as may appear to them expedient for the due administration of justice, to be sent to that Court so to be formed by his Majesty, that such issues might there be tried by a jury in manner therein after directed. The act then proceeds to provide in what manner the Lord Ordinary should report to the Division of the Court for that purpose, and in what manner the Judge of the Court of Admiralty should report to either of the Divisions for this purpose; and then it expressly enacted, 'That it shall not be competent, either by reclaiming petition, or appeal to the House of Lords, to question any interlocutor granting or refusing such trial by jury.' Your Lordships will see here, that there is great care taken to prevent delay; for this clause not only denies the competency of an appeal to the House of Lords, but it denies the competency of an appeal by reclaiming petition.

The sixth section is the next which it is material to point out to your Lordships, and it is in these words:—'Be it further enacted by the authority aforesaid, that in all cases in which an issue or issues shall have been directed to be tried by a jury, it shall be lawful and competent for the party who is dissatisfied with the verdict, to apply to the Division of the Court of Session which directed the issue for a new trial, on the ground of the verdict being contrary to evidence—on the ground of misdirection of the Judge—on the ground of the undue admission or rejection of evidence—on the ground of excess of damages, or of res noviter veniens ad notitiam—or for such other cause as is essential to the justice of the case.' So that your Lordships observe here, that if the party is dissatisfied with the trial, he may apply for a new trial on any of the special grounds which are here mentioned, or on any ground which he can represent to the Court, as affording cause for a new trial essential to the justice of the case. And, my Lords, undoubtedly it may happen that the Court of Session may mistake in their conclusion upon the question, whether the verdict be contrary to evidence;

Feb. 15. 1822. —they may possibly mistake, if an application is made upon the ground of the misdirection of the Judge;—they may possibly mistake, if the application is made upon the ground of the undue admission or rejection of evidence;—and they are the more likely to mistake, if the ground is, that there is some cause, essential to the justice of the case, for assigning such new trial, as that opens to very large consideration. But the Legislature was so well satisfied that giving the party an opportunity to appeal here upon the refusal of a new trial would lead to constant applications to this Court, even where there was no cause for such application, that it was thought, at the time this act passed, to be a much less mischief to deny in any case an appeal to this House where a new trial was refused, than to grant a new trial; and the act accordingly provided that such interlocutor granting or refusing the new trial shall not be subject to review by reclaiming petition, or by appeal to the House of Lords.

Then, my Lords, it became necessary likewise to make some provision not only for new trials, but for what are known in the law of England by the description of bills of exception; and the seventh section applies to that subject in these terms:—'That it shall be competent to the counsel for any party, at the trial of any issue or issues, to except to the opinion and direction of the Judge or Judges before whom the same shall be tried, either as to the competency of the witnesses, the admissibility of evidence, or other matter of law arising at the trial.' It is not a general enactment that it shall be competent at the trial to except to the opinion of the Judge or Judges in all cases in which an issue or issues shall have been directed to be tried by a jury; but it is, that it shall be competent to take that exception, either as to the competency of the witnesses, the admissibility of evidence, or other matter of law arising at the trial, (and your Lordships will see presently what is the point in controversy with respect to these words, 'or matter of law arising at the trial'); and 'that, on such exception being taken, the same shall be put in writing by the counsel for the party objecting, and signed by the Judge or Judges; but, notwithstanding the said exception, the trial shall proceed, and the jury shall give a verdict therein for the pursuer or defender, and assess damages when necessary; and after the trial of every such issue or issues, the Judge who presided shall forthwith present the said exception, with the order or interlocutor directing such issue or issues, and a copy of the verdict of the jury indorsed thereon, to the Division by which the said issue or issues were directed; which Division shall thereupon order the said exception to be heard in presence, on or before the fourth sederunt day thereafter.'

My Lords, it is not immaterial to call your Lordships' attention to this, 'that the exception is to be heard in presence on or before the fourth sederunt day thereafter:' That, I apprehend, was also to prevent delay. 'And in case the said Division shall allow the said excep-

'tion, they shall direct another jury to be summoned for the trial of the 'said issue or issues; or if the exception shall be disallowed, the ver- 'dict shall be final and conclusive, as herein after mentioned: Pro- 'vided always, that it shall be competent to the party against whom 'any interlocutor shall be pronounced on the matter of the exception, 'to appeal from such interlocutor to the House of Lords, attaching a 'copy of the exception to the petition of appeal, certified by one of the 'Clerks of Session; so as such appeal shall be presented to the House of 'Lords within fourteen days after the interlocutor has been pronounced, 'if Parliament shall be then sitting; or if Parliament shall not be sit- 'ting, then within eight days after the commencement of the next ses- 'sion of Parliament, but not afterwards.' The part which I have now read, therefore, provides for the speedy application to Parliament by presenting the petition. The section goes on to require Parliament speedily to hear the matter with respect to which such application shall have been made: 'And so as the proceedings on such appeal do conform 'in all respects to the rules and regulations established respecting appeals; 'and every such appeal shall be appointed to be heard on or before the 'fourth cause day after the time limited for laying the printed cases in 'such appeal upon the table of the House of Lords;'—giving, as your Lordships see, these appeals a priority to other appeals;—'and upon 'the hearing of such appeal, the House of Lords shall give such judg- 'ment regarding the further proceedings, either by directing a new 'trial or otherwise, as the case may require.' And then it states, 'That 'if a new trial shall be refused, or if the exception taken to the opinion 'and direction of the Judge or Judges shall be disallowed, the verdict 'shall be final and conclusive as to the fact or facts found by the jury, 'and shall be so taken and considered by the Court of Session or the 'Judge Admiral respectively in pronouncing their judgment, and shall 'not be liable to be questioned any where.'

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The sixth section, therefore, provides for the case of motion for new trial; the seventh section provides for the case of bills of exception; and the sixth, seventh, and eighth sections, taken together, provide for the refusal of new trial being final, and for what is to be done in matters of bills of exception, and for speedy judgment upon questions arising upon bills of exception.

My Lords, it is necessary to point your Lordships' attention farther to the ninth section of this act of Parliament, because the question at present is, upon what is the true construction of that act of Parliament. That section is in these words: 'Provided always, that in all cases 'wherein the Court shall pronounce a judgment in point of law, as 'applicable to or arising out of the finding by the verdict, it shall be 'lawful and competent for the party dissatisfied with the said judgment 'in point of law, to bring the same under review, either by representa- 'tion or reclaiming petition, or by appeal to the House of Lords; or 'where the Judge Admiral shall have pronounced judgment in point of

Feb. 15. 1822. 'law on the verdict, it shall be lawful and competent for the party or 'parties to bring the same under the review of the Court of Session, 'as heretofore.' By which I understand the Legislature to have enacted, that if there be a verdict, and if upon that verdict a judgment is given in point of law which is not applicable to the facts found by that verdict, there may be a reclaiming petition, or an appeal. But if there be a verdict, and if a motion has been made to set aside that verdict, and an application has been made for a new trial, and that motion has been refused, then the verdict still stands as a verdict; and to that verdict, undisturbed by the motion for a new trial, sanctioned by the interlocutor refusing a new trial,—if the judgment in point of law be applicable to that verdict which has been ineffectually impeached,—it appears to me that under this ninth section there is no pretence for saying (whether the Court were wrong or right in their opinion upon the verdict) that the judgment of law, taking the verdict to be a verdict not impeachable, shall be impeached here, if the judgment of law be applicable to that verdict. My Lords, I take the liberty of saying so, because it appears to me, that under the circumstances I am about to mention, you must either consider this as an appeal within the intent and meaning of the act of Parliament, or say it is an appeal founded upon some power you have to entertain it, independently of the act of Parliament.'

The case, my Lords, was this, according as it is represented in these papers: There being a list of jurors of that part of Scotland named for either four or five counties—

Mr. ADAM.—Five counties, my Lord; but two of the counties stand only for one.

LORD CHANCELLOR.—Taking them at four or five, it comes to pretty much the same; and the statute having directed that six of the first twelve are to be the viewers, and the five counties, or the four counties having four Sheriffs, (the locus in quo being in Ross,) the jurors for the county of Inverness stood first upon the list; and then this difficulty arose, whether the gentlemen of Inverness were or were not to be the viewers, as jurors, to try a question with respect to this supposed trespass which had occurred within the county of Ross;—and in as much as the Sheriff is required to bring the persons together who are to take the view, the officer by whom the precept was to be issued came to be of opinion, that unless there was special authority that could be resorted to, so as to enable the Sheriff of Inverness to bring the jurors of Inverness-shire into the shire of Ross, the jurors of Ross must be considered as the persons to proceed upon this view. Accordingly the clerk, or some officer of that kind, who appears to be very much blamed in these papers, did that which I think was very right—namely, took the opinion of the Lord Commissioner upon the way in which the jurors should be summoned; —and it does appear to me, either that the parties could have no view at all, in which case (notwithstanding the order for a view under another

clause in the act of Parliament) this trial must have proceeded without a view, or the jurors of Ross must be considered as having been the proper viewers. Feb. 15. 1822.

It is said that the Jury Court could have given some order upon this subject. It appears to me the Lord Commissioner was quite right, and that unless these papers greatly misrepresent the matter, there was no opportunity of so applying. But, supposing the fact to be that the jury was ill constituted,—admitting that, for the moment, (which is contrary to the opinion I am about humbly to state to your Lordships,)—but supposing the fact to be that the jury was ill constituted, what relief can we give in this case?

It is said that at the trial there was a bill of exceptions tendered to the Judge. Now, really those who insist that they are to proceed exactly in the same way as proceedings are had in England on bills of exceptions, would find it extremely difficult to make out that there was a bill of exceptions; but supposing that there was a bill of exceptions tendered to the Judge, and that the ground was the mal-constitution of the jury, (if I may so express it,) the Judge was of opinion that he could not receive a bill of exceptions upon such a subject. I am not now entering upon the question, whether, by analogy to the fact that a bill of exceptions may be tendered in this country with reference to a challenge of the jury, a bill of exceptions could be tendered for this matter in this cause when it was before Lord Pitmilly. I think there is great weight in the construction to be given of the clause I have read with respect to the bill of exceptions, and that it is not quite a conclusive argument to say, that any thing which happens in the Court where the trial is to be had, is within the intent and meaning of this clause, as 'matter of law 'arising at the trial.' As Mr. Adam says, you must take these words in fellowship with them, 'competence of the witnesses,' and so on. But put it, if you please, that this jury was not well constituted, it is quite unquestionable this might be, if not a ground for a bill of exceptions, at all events a ground for a motion for a new trial. Now, a motion was made for a new trial, and that motion was made on two grounds; 1. The mal-constitution of the jury; 2. That the verdict was against evidence. The application being made for a new trial upon these grounds, it is dexterously stated that it was found that motion could not be successfully pursued, and therefore the party withdrew it, but it was dismissed by an interlocutor of the Court. Then there is an interlocutor of the Court deciding that there shall be no new trial. If, then, there be an interlocutor of the Court deciding that there shall be no new trial, is not the section I have read quite decisive that we cannot review that interlocutor? I desire it to be understood, that I am giving no opinion whatever whether there may or may not come a case before the Court, in which the law has been finally applied by the Court of Session; and being finally applied by the Court of Session, this House cannot say, looking at the proceeding from the beginning to the end, that it may be

Feb. 15, 1828. necessary to begin again in some way or other. That is a question much too large for the present occasion; for, in the ultimate proceeding here, there is no ground for discussing that.

Then if we are prevented from granting a new trial because there has been that interlocutor,—and that we are prevented from granting a new trial because there has been that interlocutor, I have no manner of doubt;—because, where the Legislature has told me I shall not interfere in such a case, it is no question I am to address to my own mind, whether it would be better I should interfere in such a case. The Legislature has withholden the power, and therefore it cannot be exercised in the case. Then with respect to the bill of exceptions, (which is stated in the other case,* though not in this,) in the first place, it is not brought here in time; and if it were, it is not brought here according to the direction of the 8th section; and not being brought here within the 8th section of the statute, the counsel have very properly abandoned it, and stated that they cannot support it, if the House should be of opinion that in this case relief cannot be given; and how relief can be given, (unless it is under the 9th section,) I know not. I have a clear and decided opinion with respect to the 9th section; because, if this might have been impeached before the Division of the Court of Session, and has been impeached before the Division of the Court of Session in a motion for a new trial, and if that new trial has been refused, the consequence of that refusal of the new trial is, that the verdict is not questionable any where. It is no longer a nullity—it is a verdict; and being a verdict, the only question then is, whether the judgment which has been since given with respect to the law, is applicable to those facts which must be considered as a verdict, whether that judgment is right or wrong? And taking the facts to have been conclusively found by that verdict, and that it is to be considered as a verdict, it appears to me that the subsequent judgment which has been given, is the judgment which could be alone applicable to the facts so found. Under these circumstances, my Lords, it does appear to me (stating it most humbly to your Lordships) to be our duty to affirm the judgment of the Court below; but I am likewise of opinion that this is a case in which, to follow out the spirit in which the act has been made, the Court ought to give costs. In the first place, if the question relates to a matter of right, one has perhaps no reason for saying that still it may not be an important matter, however little importance one would attribute to the particular subject in dispute; but in a case which appears to me as clear as this case does, I am of opinion that, in furtherance of the intention of the Legislature in a case of this nature, the judgment ought not to be affirmed without something like a remuneration to this party in point of costs; and therefore, after I have learned what sum it may be right

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* See the next case.

to move your Lordships to mention in your judgment in respect of costs, it does appear to me that it will be a very wholesome proceeding, in both these cases, to dismiss the appeals, with such costs as your Lordships may think proper to give. Feb. 15. 1822.

FRASER,—J. CAMPBELL,—Solicitors.

(*Ap. Ca. No.* 1.)

No. 23.

MURDO M'KENZIE, Appellant.—*Moncreiff—Skene.*
DAVID ROSS and his CURATORS, Respondents.—*Adam—Cockburn—Maitland.*

Proof—Jury Court—55. *Geo. III. c.* 42.—An action of damages for trespass having been remitted to the Jury Court, and a view ordered—Held,—1.—That the viewers are to be selected from the first twelve jurors in the list returned for the county where the property is situated, and where the view is to be taken, although lists of other counties belonging to the same circuit have been delivered.—2.—That a bill of exceptions is an incompetent mode of objecting to these viewers acting as jurors on the trial.—3.—That a motion for a new trial, founded on that objection, being refused, all review quoad hoc is incompetent.—4.—That, in particular circumstances, parole evidence, explanatory of the situation of marches, is admissible, although there be a written contract in relation to them; and,—5.—That a bill of exceptions against such evidence being disallowed, and no appeal taken within fourteen days thereafter, review is incompetent.

M'KENZIE, proprietor of Ardross in the county of Ross, brought an action against Ross, an adjoining proprietor, stating, 'That the said David Ross has taken it upon him, most illegally 'and unwarrantably, to build a house upon a part of the hill or 'muir of Tolly, which is the absolute and undoubted property of 'the pursuer: That part of the said hill or muir having been ad-'judged to belong to the estate of Ardross by a contract entered 'into, in the year 1757, between the pursuer's grandfather and 'the now deceased Captain Cuthbert of Milncraig, and exclu-'sively possessed by the pursuer and his predecessors ever since 'that time; and although the pursuer has uniformly claimed 'right to the exclusive possession of the part of the said hill or 'muir of Tolly so found to belong to the said estate of Ardross, 'yet the said defender, by his tenant Donald Munro M'Finlay, 'most illegally and improperly keeps possession of the house so 'built by him upon the pursuer's said exclusive property.' He therefore concluded that Ross should be ordained to demolish and remove the house,—to cease from molesting him in future,—and to pay £1000 of damages. These allegations being denied, the following issues were prepared, approved of by the First Divi- Feb. 15. 1822.

1ST DIVISION. Lord Alloway.

Feb. 15. 1822. sion, and thereafter transmitted to the Jury Court: 'l. Whether 'the defender, by himself or his tenant Donald Munro M'Fin-'lay, has, without the pursuer's consent, and to the loss and da-'mage of the said pursuer, erected a house in the neighbour-'hood of the village of Tolly, upon a part of the muir of Tolly 'formerly belonging in common property to the predecessors of 'the pursuer and defender in their respective lands, but which, 'by a contract of division of said muir, entered into betwixt the 'pursuer's grandfather and the defender's predecessor in the lands 'of Milncraig, in the year 1757, became the exclusive property 'of the pursuer? 2. Whether the defender, by himself or his 'foresaids, have committed other encroachments on the part of 'the said muir, his the pursuer's exclusive property as aforesaid, 'by cutting and baring the surface thereof, and carrying off the 'same for fuel, to the loss and damage of the pursuer?' The trial was appointed to take place at Inverness at the same time as that in the preceding case, and the same objection occurred relative to the appointment of viewers. In the course of the trial, Ross having proposed to adduce witnesses to prove the state of possession, M'Kenzie objected that parole evidence was incompetent, seeing that the respective marches of the parties were established by the contract of 1757. Lord Pitmilly repelled the objection, on the grounds subsequently stated by his Lordship in a report to the Court. * A bill of exceptions was tendered; and the jury having found for Ross, M'Kenzie moved the Court of Session for a new trial, on the ground, 1. That the viewers had been irregularly appointed; and, 2. That incompetent evidence

* These grounds were thus explained by his Lordship:—"I repelled the objection for this reason, that although the evidence of the present state of the marches could not invalidate the contract 1757, on the ground of the marches fixed in that contract having been altered by subsequent usage and prescription, (no such question having been put in the issues); yet, in a nice and narrow question of fact, as the present turns out to be, whether the disputed spot where the hut is built (which is very near the march) was included in Ardross or in Milncraig's share of the muir, as settled by the contract 1757, the evidence of the marches since the date of the contract might serve as an article of evidence in a doubtful case as to the precise line allotted by the contract 1757, and on which side of the line the hut in dispute was situated. I distinctly stated that it was only in this view, and as the witnesses could scarcely be examined at all without hearing their account of the present state of the marches, that I would allow the investigation to proceed; and accordingly I explained very fully to the jury, in summing up, that no question having been put to them in the issues, whether the march agreed upon in 1757 was departed from by subsequent usage, they must not allow the evidence of usage per se to bring about a verdict in favour of the defender, but must hold it merely as an article of evidence, the weight due to which they would consider in determining as to the import of a nice and narrow proof as to whether the hut was built on Ardross or Milncraig's side of the march, as agreed on in the contract 1757."

had been received. The Court, on the 19th of January 1819, 'Having heard counsel, in terms of their former interlocutor, 'as well upon the bill of exceptions as upon the motion for a 'new trial, they disallow the exceptions for a new trial, and de-'clare the verdict conclusive.' * No appeal was entered against this interlocutor in relation to the disallowance of the bill of exceptions within fourteen days, in terms of the statute; and the case then returned to the Lord Ordinary, who, in respect of the verdict, assoilzied Ross, and found him entitled to expenses. Against this interlocutor M'Kenzie did not present a petition to the Inner House, but entered an appeal to the House of Lords, on the same grounds on which he had moved for a new trial. To this it was answered, that the appeal was incompetent—1. Because, so far as regarded the disallowance of the bill of exceptions, it ought to have been entered within fourteen days, which had not been done; and that, so far as regarded the motion for a new trial, as it had been refused, the verdict was final, and not liable to be questioned any where. 2. That as the interlocutor of the Lord Ordinary had not been reviewed, the appeal was further incompetent in terms of the 48. Geo. III. c. 157, § 15; and, 3. That the objections were unfounded on the merits. The House of Lords 'Ordered and adjudged that the interlocutors complain-'ed of be affirmed, with £100 costs.' † Feb. 15. 1822.

Appellant's Authority.—2. Dict. p. 218, 219.

FRASER,—J. CAMPBELL,—Solicitors.

(*Ap. Ca. No. 2.*)

JEAN HUMPHRY, Appellant.—*Jeffrey—Brownlee.*
JAMES AITKEN, Respondent.— No. 24.

Proof—Semiplena Probatio—Bastard.—1.—Circumstances in which a criminal intercourse between the mother and alleged father of a bastard, prior to the time when the child must have been begot, held not to amount to a semiplena probatio;—and, 2.—A stepmother held not an admissible witness for her stepdaughter, although the husband had been dead for upwards of sixteen years.

JEAN HUMPHRY presented a petition to the Justices of Peace for Ayrshire, stating that in the end of January 1813 she was delivered of an illegitimate male child, of which James Aitken, a married man, was the father,—and praying that he should be Feb. 18. 1822. 2D DIVISION. Lord Craigie.

* Not reported. † See the Lord Chancellor's speech in the preceding case.

Feb. 18. 1822. ordained to pay to her a certain sum of aliment for behoof of the child until it should arrive at the age of fourteen, and relieve her of the inlying expenses. Aitken having denied that he was the father, a proof was taken; on advising which, the Justices allowed Humphry to depone in supplement. Against this, Aitken (after taking an appeal to the Quarter Sessions, which was dismissed) presented a bill of advocation; which having been passed, Lord Craigie, on considering a condescendence and answers, allowed a new proof, 'with this limitation, that the commissioner shall not 'receive as a witness the respondent's daughter, or any other per-'son against whose admissibility there is a legal objection.' To this interlocutor he adhered; and in reference to an objection as to re-examining the former witnesses, he stated in a note, that 'by the restriction contained in the interlocutor, the Lord Ordi-'nary intended to exclude the examination of those persons who, 'like the respondent's daughter, were generally inadmissible as 'witnesses. As to the re-examination of those persons who had 'formerly been brought forward as witnesses, the Lord Ordinary 'at the time was not called upon to give any determination. In 'practice, however, the Court are not so unfavourable to re-exa-'minations as formerly; and although they are not allowed of 'course, especially where the first examinations have taken place 'under the direction of counsel, yet, upon any reasonable cause 'shown, and particularly where the witnesses are to be examined 'as to circumstances which were not formerly in the view of the 'parties, it is not unusual to permit this sort of supplementary 'evidence. This was done in a case which depended before the 'Lord Ordinary, and in which the Court altered an interlocutor of 'his refusing an examination, the party demanding it not having 'given (as the Lord Ordinary thought) a sufficient reason for it. 'The parties were Geddes of Torbanhill and Bailie Masterton of 'Culross. The petition of Mr. Geddes is dated 8th July 1812, '—Mr. Mackenzie, clerk. In this case the commissioner will no 'doubt use his discretion, both in admitting witnesses to be ex-'amined, and as to the subject and extent of the re-examination.' A new proof was accordingly taken, in the course of which the former witnesses were re-examined; and Margaret M'Skimming, the stepmother of Humphry, having been offered to be adduced on her behalf, the commissioner permitted her to be examined, subject to the decision of the Lord Ordinary and the Court. A great deal of contradictory evidence was brought forward as to a familiarity and criminal intercourse between the parties, chiefly in the winter of 1811, (being long prior to the period when the child must have been begot); and it appeared that Humphry had

applied to a medical man to procure an abortion. When the case came before the Lord Ordinary, the objection to Margaret M'Skimming was renewed; and the answer which was made by Humphry was, that her relationship had been dissolved upwards of sixteen years previously by the death of her father. The Lord Ordinary 'sustained the objection to the admissibility of Margaret M'Skimming as a witness,' and assoilzied Aitken. Humphry having represented, his Lordship appointed the representation and answer to be printed, in order to be reported, and issued the following note: 'There seems to be some inconsistency in the decisions of 'the Court as to the circumstances in which an oath in supplement 'should be admitted in such questions as the present; and as the 'Lord Ordinary cannot altogether acquiesce in the decision lately 'given in the First Division of the Court, and referred to in the representation,* his opinion being the same with that which was 'given by Lord President Blair in the case of Craig, he has sent 'this case to the Court in the least expensive form he could think 'of. In this case it appears to the Lord Ordinary, that the evidence of a carnal intercourse between the parties, at a date long 'prior to the begetting of the child in question, (even though it 'were more unexceptionable than it is,) ought not to be held per se 'as a semiplena probatio; and that the pursuer's general habits 'and conduct, as stated by herself, and particularly her having attempted, as she alleges, to procure abortion, are such as ought to 'induce the Court, with great reluctance, to admit her oath in supplement.' The Court, on the 4th of July 1816, 'adhered to the 'interlocutor represented against, and refused the desire of the 'representation;' and thereafter, on the 29th November of the same year, refused a petition without answers.† Humphry then entered an appeal to the House of Lords, on the ground, 1. That Margaret M'Skimming was an admissible witness; and, 2. That the evidence adduced, independent of her testimony, amounted to a semiplena probatio, seeing that a great familiarity and repeated instances of criminal intercourse had been established, so that she was entitled to her oath in supplement. No case was lodged or appearance made by Aitken; but, notwithstanding, the House of Lords 'Ordered and adjudged that the interlocutors complained of be affirmed.'

Feb. 18. 1822.

Appellant's Authorities.—Wightman, Nov. 17. 1807, (No. 5. App. Proof.); Craig, June 14. 1809, (F. C.); Hunter, Jan. 15. 1811, (F. C.); Hunter, May 24. 1814, (F. C.); Colville, Dec. 12. 1812, (not rep.); Thomson, Feb. 1814, (not rep.)

J. RICHARDSON,— —Solicitors.

(*Ap. Ca. No.* 4.)

* Hunter v. Hunter, May 24. 1814, (F. C.)

† Not reported.

No. 25. DAVID CARNEGY, Appellant.—*Romilly—Clerk—Fullerton.*
Miss MARGARET SCOTT, Respondent.—*Gifford—Moncreiff—H. J. Robertson.*

Landlord and Tenant—Clause.—A lease having been granted for two 19 or 38 years, 'and the lifetime of the person having right to this present tack at the expiry of 'the said two 19 years, either as heir or assignee,' provided such assignation be made within 29 years from the commencement of the lease, failing which, the lease to belong to the heir of the tenant; and the tenant having remained in possession for the whole period, and during his own lifetime—Held, (affirming the judgment of the Lord Ordinary, and reversing that of the Inner House,) that a party claiming right as his heir could not insist on possessing during her own life.

March 6. 1822.
2D DIVISION.
Lord Pitmilly.

THE late Mr. Carnegy, the father of the appellant, exposed in 1769 two farms, Upper and Nether Dysart, to be let according to articles and conditions of roup. Patrick Scott, the father of the respondent, was preferred to that of Nether Dysart; and an instrument of lease was immediately executed, by which Mr. Carnegy let to Scott, 'his heirs and assignees, (such assignees being 'always made in manner and within the space after expressed,) all 'and haill the town and lands of Mains of Meikle or Nether Dysart, &c., and that for the space of two 19 or 38 years and crops; 'and after the expiration of the said two 19 years, for all the years 'and crops of the lifetime of the person having right to this present tack, at the expiry of the said two 19 years, either as heir or 'as assignee appointed within the space after expressed, from and 'after their entry to the said lands, which is hereby declared to be 'and begin to the said dovecot at the term of Martinmas next; 'to the houses, yards, and grass at the term of Whitsunday 1770; 'and to the arable land at the separation of the crop 1770 from the 'ground;—reserving always to the said Thomas Carnegy an acre 'of land or thereby of the lands hereby set,' &c. 'And farther, 'the said Thomas Carnegy hereby gives and grants full power to 'the said Patrick Scott and his foresaid, to assign this present tack 'at any time before the expiration of the first 29 years thereof; 'but if such assignees are not made, and the assignations duly 'intimated to the said Thomas Carnegy, or his heirs and successors, before that time, then this tack is to fall to the heirs of 'the person having right to the same at the end of the said 29 'years; and all assignations made of this present tack after the 'lapse of the said 29 years, and although then made, if they 'are not duly intimated to the said Thomas Carnegy or his 'foresaid before that period, are hereby declared to be void 'and null.' Mr. Scott did not avail himself of the power to assign, but continued in the possession till the year 1814, being

six years after the expiration of the stipulated period of 38 years. He had three daughters, all of whom were alive at the termination of the 29 years; but two of them died before the lapse of the 38 years, and one of them left issue. Mr. Scott died in 1814; and soon thereafter the appellant, as the heir and successor of his father in the estate, presented a petition to the Sheriff of Forfarshire, praying for warrant of removal against Miss Scott, the surviving daughter, and who remained in possession after her father's death. In defence she contended, that, according to the terms and the true meaning of the contract of lease, a liferent, after the expiry of the 38 years, was conferred on the assignee, or on the heir of the original tenant in possession;—that although it was competent to her father to have assigned the lease within the first 29 years, and thereby to have given a right to an assignee, not only for the remaining period, but for the assignee's life, yet, as he had not done so, the liferent right necessarily fell to her as her father's heir;—that it was impossible to interpret the lease, so as to infer that her father was to have a right of liferent; and that accordingly, on the understanding that such was the case, and that she was to enjoy the lease during her life, her father had made great and extensive ameliorations. To this it was answered, that by the lease Mr. Scott obtained a right to the farm for himself, his heirs and assignees;—that the right of assigning without the consent of the landlord was limited to 29 years, and his own right to that of 38 years, and (if he should survive that period) for his lifetime;—that it was not intended to give both to him and to his heirs a right of liferent, and that if the liferent was enjoyed by the one, another liferent could not be insisted on by the other;—that Mr. Scott had availed himself of his own liferent right for more than six years after the expiration of the term specified in the lease, and that consequently the period for its termination had arrived. The Sheriff having decerned in the removing, Miss Scott brought a bill of advocation, which was refused by Lord Glenlee; but, on a petition to the Court, a remit was made to pass it. Thereafter, the case having come before Lord Pitmilly, he, on the 11th July 1815, found 'that 'the clause in the lease on which the advocator (Miss Scott's) 'claim is founded, is not applicable to the case which happened, of 'the original tenant not having assigned the lease within the stipu-'lated term of 29 years from its commencement, but having sur-'vived the period of 38 years from the date of the lease, and 'having himself remained in possession of the farm during his life-'time: That the clause of the lease referred to by the advocator 'provides for the continuance of the lease after the fixed period of

March 6. 1822.

March 6, 1822. '38 years during the lifetime either of an assignee who might 'have acquired right to the lease before the expiration of the first '29 years, and in virtue of his assignation might have been in possession at the end of the 38 years,—or during the lifetime of the 'person who may have been the heir of the tenant at the end of 'the 29 years, and afterwards might have succeeded to the lease, 'and been himself in possession at the expiration of the 38 years: 'That the right of liferent adjected to the fixed period of 38 years 'was intended to be given to the person in possession when the 'liferent was to commence, and was accordingly in one of the cases 'mentioned in the tack conferred on an assignee to the lease; and 'there is no room for holding, either that the heir of the original 'tenant could dispossess the tenant in possession, or that the dura-'tion of the right of the tenant in possession after the fixed period 'was to depend on the length of the life of the person who may 'have been presumptively his heir at the end of 29 years from the 'commencement of the lease;' and therefore repelled the reasons of advocation, and remitted simpliciter to the Sheriff. To this interlocutor he adhered on the 16th of January and the 23d of May 1816. Miss Scott reclaimed; and the Court, after having been equally divided, altered the interlocutor, assoilzied her, and found her entitled to expenses; and to this interlocutor they adhered on the 26th of May 1818.* Mr. Carnegy having appealed against these judgments, the House of Lords (without requiring the appellant's counsel to reply) 'Ordered and adjudged, that the in-'terlocutors complained of be reversed: And it is further ordered 'and adjudged, that the interlocutors of the Lord Ordinary of 'the 11th of July 1815, and the 16th of January and 23d of 'May 1816, be affirmed.'

LORD CHANCELLOR. — This is a question as to the endurance of a lease. In the course of the cause, an interlocutor was pronounced by Lord Pitmilly, Ordinary, which appears to me to express the clear meaning of the lease. In my opinion, therefore, the interlocutor of the Court, altering that of the Lord Ordinary, cannot stand. The Court of Session make the respondent heir of her father. There is some difficulty, I think, in investing her with this character, and they give her a liferent after that of her father. I think there is no doubt that the intent was, that if her father outlived 38 years, the lease was to expire with his life. Therefore we must reverse the interlocutor complained of, and affirm that of the Lord Ordinary.

SPOTTISWOODE and ROBERTSON,—A. MUNDELL,—Solicitors.

(*Ap. Ca. No.* 7.)

* Not reported.

ARCHIBALD NEWBIGGING and Others, Appellants.—*Romilly—Ivory.*
A. M'GREGOR and COMPANY and Others, Respondents.—*Scarlett—Greenshields.*

No. 26.

Insurance.—A ship having, during the subsistence of the non-intercourse law with America, been insured from Liverpool to New Orleans, with liberty to call at any port in the course of the voyage, and part of the premium to be returned if the voyage terminated at Pensacola; and the ship having arrived safely at Pensacola, but being lost three weeks thereafter, and there being evidence to show an intention of holding the voyage terminated—Found (reversing the judgment of the Court of Session, and affirming that of the Judge Admiral) that the insurers were not liable.

March 6. 1822.

2D DIVISION.
Lord Pitmilly.

M'GREGOR and Company and others were proprietors of the ship Earl Bathurst, commanded by Captain Heron, and were in the practice of trading with the United States of America. In 1811, all British ships and merchandise were excluded from the ports of the United States by a non-intercourse law; in consequence of which, British merchants resorted to circuitous methods of conducting their speculations, so as to get their cargoes introduced into these States. With this view, they usually addressed their adventures to agents at some of the neighbouring ports in Spanish America. M'Gregor and others being desirous to send the Earl Bathurst to New Orleans with a cargo, and to bring home another, addressed a letter, on the 27th of June 1811, to their correspondents, Messrs. Urquharts, of that port, stating that, 'in the situation of matters at present, we are 'at a loss how to employ the Earl Bathurst otherwise than send-'ing her to Pensacola, which we have concluded to do. On re-'ceipt of this, you will, if the laws of your country still preclude 'British ships from entering your port, send round, as before, a 'cargo of cotton in as short a time as possible; but, if the restric-'tions be removed, Captain Heron will only touch at Pensacola, 'and proceed to New Orleans.' On the 12th of July thereafter, M'Gregor and others effected a policy of insurance over the Earl Bathurst with Newbigging and others, by which the latter bound themselves to insure her 'at and from Liverpool 'to New Orleans, with leave to call at Pensacola for any purpose 'upon any kind of goods or merchandise, and also upon the 'body tackle, apparel, ordnance, munition, artillery, boat and 'other furniture of and in the good ship or vessel called the Earl 'Bathurst, beginning the adventure upon the said goods and 'merchandise from the loading thereof aboard the said ship, &c. 'at Liverpool, and so shall continue and endure during her abode

March 6. 1822. 'there upon the said ship, &c.; and further, until the said ship, '&c. shall be arrived at New Orleans, &c. until she hath moored 'at anchor 24 hours in good safety, and upon the goods and mer-'chandise, until the same be there discharged and safely landed; 'and it shall be lawful for the said ship, &c. in this voyage to pro-'ceed and sail to, and touch and stay at any port or place what-'soever as above described, without prejudice to the insurance. 'The said ship, &c., for so much as concerns the assureds by 'agreement between the assureds and assurers in this policy, are 'and shall be valued at £4000 sterling, being on the hull and ma-'terials of the said Earl Bathurst, at and after the rate of £6. 6s. 'per cent., to return £1 sterling per cent. if the voyage end at 'Pensacola.' By written instructions delivered to the captain on the same day, M'Gregor and others, after directing him to proceed to Pensacola, and on his arrival there to wait on John Forbes and Company of that port, stated—'Our friends Messrs. T. and 'D. Urquhart of New Orleans will no doubt have informed these 'gentlemen of your ship being expected, and have given them 'the necessary orders relative to your present cargo, and that of a 'return one. Should this be otherwise, and you learn that the 'ports of the United States are open to the entry of British ves-'sels, you will without delay proceed to New Orleans, and put 'yourself under the charge of these gentlemen; but if no entry is 'allowed into the United States, you will remain at Pensacola, and 'immediately write Messrs. Urquharts of your arrival there, to 'which, from the vicinity of the two places, you may have an answer 'in a few days.' In a letter to Forbes and Company they stated, that 'this will be handed by Captain Heron of the Earl Bathurst, 'who is instructed to remain under your care, provided the laws 'of the United States are still in force against British ships enter-'ing their waters.' The ship accordingly sailed on the 17th of July, and arrived safely at Pensacola on the 17th of September thereafter. On her arrival, Captain Heron immediately wrote to Urquharts of New Orleans, stating, among other things, that 'as the political affairs of the United States and Great Britain are 'at present, cannot proceed to your port as formerly without your 'advice, though I am cleared for the same.' On the following day Forbes and Company also wrote to Urquharts, observing, that 'we presume there can be no other alternative, under exist-'ing circumstances, than to have the cargo landed and disposed of 'here, as its character of British renders it inadmissible with you.' No answer was received to these letters from Urquharts, nor to several which were subsequently written,—a circumstance alleged to have been occasioned by the land post between New Orleans

and Pensacola having ceased to travel, and by the communication by sea being impeded by the state of the wind. In point of fact, the non-intercourse law still subsisted, and Captain Heron and Forbes and Company in their letters uniformly assumed that it would be necessary that the cargo should be landed at Pensacola, and that a return cargo should be sent from New Orleans to that port. After lying for 24 days at Pensacola, the Earl Bathurst was on the 12th of October totally wrecked by a violent hurricane; and it appeared from the subsequent correspondence on this subject, that M'Gregor and others considered it fortunate that the return cargo had not been forwarded from New Orleans to Pensacola. Having thereafter brought an action before the Court of Admiralty against Newbigging and others the underwriters, founding on the policy of insurance, the latter pleaded in defence, that the alternative risk of the voyage ending at Pensacola had been adopted by M'Gregor and others and their agents, and that, as she had been safely moored there for more than 24 hours, the insurance was terminated. To this it was answered, that leave was given by the policy to call at Pensacola for any purpose—that no period was limited—that the port at which the voyage was to end was to depend upon orders from Urquharts at New Orleans—and that the ship had been waiting at Pensacola for the purpose of receiving these orders when she was lost, and therefore the voyage could not be held as finished. The Judge Admiral, on the 1st of April 1813, found, 'That the ship Earl Bathurst was insured at 'and from Liverpool to New Orleans, with leave to call at Pensa-'cola for any purpose; and the premium was thus expressed: 'Six 'guineas per cent. to return £1 sterling per cent. if the voyage end 'at Pensacola;' and consequently, although the vessel was insured 'all the way to New Orleans, it was in the contemplation of all 'parties that the voyage might end at Pensacola: That the ship, 'commanded by Captain Heron, sailed from Liverpool on 17th 'July 1811, and arrived at Pensacola on 17th September there-'after: That on the 12th July, previously to the ship's sailing, 'Captain Heron received written instructions for his government, 'wherein he is directed thus: 'We now instruct you to proceed to "Pensacola, the place of her destination,' &c.; and in an after part 'of the instructions, he is farther directed, 'that if he learn that "the ports of the United States are open to the entry of British "vessels, he would without delay proceed to New Orleans:' There-'fore Pensacola was the direct port of destination for the Earl 'Bathurst, and she was to proceed to New Orleans, only in the 'event of British ships being admissible into the ports of the 'United States: That when the ship arrived at Pensacola, the

March 6. 1822.

March 6. 1822. 'ports of the United States were shut against British ships; and 'throughout the whole correspondence, (particularly in that of 'Messrs. Urquhart and Company at New Orleans, to whom the 'cargo was consigned,) there does not appear the most distant 'surmise of the possibility of the Earl Bathurst proceeding to 'New Orleans, and time has since proved that at this hour the 'vessel could not have proceeded to that port; therefore Pensacola 'must be held to have been the port of the vessel's destination, 'and that although her cargo was kept aboard, this was merely be-'cause it was, by the pursuers, put under the directions of Messrs. 'Urquhart and Company, from whom notice had not arrived 'how it should be disposed of; and as the vessel lay in the har-'bour there from the 17th of September to the 19th of October, 'when she was wrecked, the insurance in question, which was 'on the vessel only, was at an end;' and therefore assoilzied the underwriters, but found no expenses due.—This judgment M'Gregor and others brought under review of the Court of Session by a reduction; and Lord Pitmilly reduced in terms of the libel, and decerned against the underwriters, 'in re-'spect it appears from the letters of correspondence produced, 'that the resolution as to the voyage of the Earl Bathurst, 'whether it should terminate at Pensacola, or be continued 'from thence to New Orleans, was left by the owners, when the 'ship sailed from Liverpool, to be regulated by circumstances 'which could not be ascertained till the arrival of the vessel in 'America, and as to which the captain was referred to Messrs. 'Urquharts of New Orleans, the consignees of the cargo, under 'whose entire control he was to hold himself after reaching Pen-'sacola, excepting in the single event of his learning positively, 'on his arrival there, that the ports of the United States were 'open for British vessels, in which case he was to proceed directly 'to New Orleans,—and in respect the ship was wrecked at Pensa-'cola, while the captain, without having landed any part of the car-'go, was waiting for instructions from Messrs. Urquhart, in answer 'to letters dispatched by him to them immediately after his arrival 'at that port,—that the voyage cannot be held to have ended at 'Pensacola before the loss of the ship, and the vessel cannot, on the 'ground of the voyage having terminated, be held to have been 'uninsured, while the captain was, in obedience to instructions from 'his owners, waiting, without any undue delay, for directions from 'the consignees as to the destination of the vessel and cargo.'—To this interlocutor the Court adhered on the 10th of December 1816.* Newbigging and the other underwriters having then

* Not reported.

entered an appeal, on the grounds already stated, the House of Lords 'Ordered and adjudged, that the interlocutors complained 'of be reversed, and that the decree of the Judge Admiral in 'Scotland be affirmed.' March 6. 1822.

J. CAMPBELL,—J. RICHARDSON,—Solicitors.

(*Ap. Ca. No.* 8.)

JOHN BOYES, Appellant,—*Clerk—Millar.*
Mrs. SCOTT WARING, Respondent.—*Gifford—Forsyth.*

No. 27.

Factor.—Circumstances in which it was held, (affirming the judgment of the Court of Session,) that the son and heir of a factor employed to uplift rents had no right to demand a recompense for his father's services, or for his own.

IN 1798, James Duke of Hamilton being desirous to make a provision in favour of the respondent (then Mrs. Esten,) and her daughter Miss Hamilton, executed two leases, by which he let to his factor, Captain Boyes, his heirs, assignees, and subtenants, certain farms in Lanarkshire and Linlithgowshire, for 19 and 21 years, at small rents. On the other hand, Captain Boyes granted two deeds declaratory of the nature and objects of these leases; and in particular declaring, 'That whatever advantages or 'rise of the money-rents can be obtained by subsetting the lands 'and farms before mentioned, or by assigning the said lease, or 'any part thereof, shall be held in trust for the use and behoof of 'the said Mrs. Harriet Pye Esten during her lifetime, and of 'Ann Douglas Hamilton, her daughter, and any other child or 'children that may be procreated between the said Duke and her, 'in manner underwritten: And she has further reposed in me the 'trust and charge of collecting the surplus money-rents to be ob-'tained by subsetting, or the prices to be got by assignments: 'Therefore, I hereby oblige myself and my heirs, or others suc-'ceeding to me in the said lease, to use all manner of diligence and 'pains in getting said lands and farms subset for the highest rents 'that can be got therefor, and to report my diligence and success 'therein to the said Mrs. Harriet Pye Esten, delivering to her a 'faithful and true account, from time to time, of the rises of rent 'that may be obtained by subsetting, and the prices or consider-'ation to be obtained by assignment of the lease, or any part 'thereof; and, after paying the respective rents stipulated by the 'said leases, to pay over to the said Mrs. Harriet Pye Esten all March 6. 1822.

2D DIVISION.
Lord Craigie.

March 6. 1823. 'and whatsoever sum or sums of money as may be so got, raised, 'and recovered by me from my subtenants or assignees, upon 'subsetting the said lands and farms, or any part or parts thereof; 'and, after her death, to pay over the same, along with what 'may remain unaccounted for to herself, to the said Miss Ann 'Douglas Hamilton, and any other child or children she may 'have as aforesaid, equally among them, or in such proportions 'as the said Mrs. Harriet Pye Esten may direct and appoint by 'any writing under her hand, and that yearly and termly during 'the currency of the said lease, and as soon as the same can be 'got in, uplifted, and recovered by the ordinary and usual modes 'of process and diligence, deducting always all charges of manage-'ment, and a reasonable allowance for my own trouble.'—In pursuance of this trust, Captain Boyes subset the whole farms at an increased rent, and accounted yearly for the surplus to the respondent till the period of his death, in 1812. In the accounts which he so rendered, he deducted the expenses of management, but made no charge for his own trouble. Immediately on the death of Captain Boyes, his son and heir (the appellant) began to uplift the rents; but notice was forthwith given to him by the respondent that he was not to do so. He however persevered, and it was necessary to resort to legal measures, both to prevent him from uplifting the rents, and to compel him to denude of the leases. Soon after the death of James Duke of Hamilton, his successor Archibald Duke of Hamilton having raised an action for setting aside the leases, brought a process of multiplepoinding in name of the appellant, with a view to make him account for the rents with which he had intromitted. In this process the appellant was required to consign the amount; but this he resisted on the ground that he was entitled to take credit for £1200 as the amount of factor-fee due to his father for twelve years, at the rate of £100 per annum, and also for £150, as a fee to himself for acting as factor during a year and a half after his father's death. In support of these claims, he contended, 1. That as his father was a professional man, and had actually been at great trouble in the business of the respondent, he was entitled, ex lege, to a proper recompense; 2. That he had right to it ex contractu, because a reasonable allowance for his trouble was stipulated in the trust-deed; and, 3, That as the leases were taken to heirs, and the trust was to the same effect, he was entitled, as heir of his father, to uplift the rents, and to a factor-fee for doing so. To this it was answered, 1. That it was proved from the annual accounts rendered by the appellant's father for twelve years, and the letters accom-

panying them, that he had entirely given up whatever claim for factor-fee he might have had against the respondent, and that accordingly he paid to her the balances due on these accounts, without retaining any thing for his trouble;—that if he had intended to make any such claim, he would have deducted it, in terms of the trust-deed, from the sums received by him,—but that he did not do so, thereby showing that he had no intention of making such a claim:—that he evidently considered the emoluments derived from his office of factor for the Duke a sufficient recompense; and that the only difference which was made on his duty by the trust-deed was, that he remitted the rents to the respondent instead of the Duke. 2. That if there were any such claim, the appellant's father was liable to her for losses arising from omitting to recover rents; and, therefore, that if an accounting were to be gone into, a large balance would exist in her favour; and, 3. That as the appellant had uplifted the rents, not only without her authority, but in express opposition to her orders, he had no title to any remuneration for so doing. March 6. 1822.

Lord Craigie found, 'That, in the circumstances of the case, the 'pursuer (appellant) has no right to claim a recompense for any 'service performed by his father in relation to the leases held by 'him in trust for the objector (respondent) and her daughter; 'while the pursuer himself, never having been authorized to levy 'the rents, can have no claim of that sort.'—To this interlocutor the Court adhered on the 11th of February and 11th of March 1818.*—Boyes having appealed, the House of Lords (without hearing the respondent's counsel) 'Ordered and adjudged that 'the interlocutors complained of be affirmed, with £60 costs.'

Respondent's Authorities.—Grahame, Jan. 5. 1683, (6534); Seton, Jan. 31. 1684, (11385.)

J. CAMPBELL,—SPOTTISWOODE and ROBERTSON,—Solicitors.

(*Ap. Ca. No.* 9.)

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* Not reported.

No. 28. Lady MARY L. CRAUFURD, Appellant—*Forsyth—Adam.*
ARCHIBALD REID, Respondent.—*Fullerton—Brougham.*

Master and Servant.—Circumstances in which it was found, (reversing the judgment of the Court of Session,) that a mistress was entitled to dismiss a servant who had been absent from his service for four days without leave.

March 13. 1822.
2D DIVISION.
Lord Glenlee.

IN 1810, Lady Mary Lindsay Craufurd hired Reid to be her principal gardener at her seat called the Priory in the county of Fife, where she had an extensive garden, with pinery, hot-houses, &c. Prior to the month of February 1812, it was arranged that Reid should leave her service at Martinmas thereafter. On Thursday the 6th of February (being the day of the King's fast) Reid went to Edinburgh, and did not return till the following Sunday. Lady Mary immediately dismissed him; and he having declined to remove from a house which he possessed as her gardener, she raised an action before the Sheriff of Fife to compel him to do so. In defence he stated, that although he had obtained no special leave to go to Edinburgh, or to be absent, yet he had previously received general instructions to procure a quantity of forest trees, which were to be planted at this time of the year;—that, with the view of getting these trees, he went to Edinburgh, where he ordered them;—that by various accidents he had been detained longer than he intended, but had only been absent two working days;—that, on former occasions, he had repeatedly, in consequence of such general instructions, gone from home on the business of his mistress, when convenient, without obtaining special liberty to do so, and that no complaint had been made on that account. To this it was answered, that he had gone to Edinburgh on his own private business; that although he had made a pretence of purchasing trees, yet he had not done so; and that he had no such general instructions as alleged. The Sheriff having allowed a proof, it appeared that Reid had called on several nurserymen, and had ordered a large quantity of forest trees for Lady Mary's, but that he had afterwards forbidden them to be sent, and that he had told two of the witnesses that he had come to Edinburgh to inquire for a situation as a gardener. The Sheriff found that Lady Mary 'was warranted in dismissing him from her service, 'and that he was bound to remove from the house mentioned in 'the petition. Reid having brought an advocation, and raised an action concluding for wages till Martinmas 1812, Lord Glenlee reported the case; and the Court, after being equally divided in opinion, and having called in Lord Pitmilly, found 'that the 'dismissal of the pursuer Archibald Reid by the defender Lady

'Mary Lindsay Crauford from her service was not warrant- March 13. 1822.
'ed;' and found him entitled to wages and board-wages to the term of Martinmas subsequent to the dismissal. To this interlocutor they adhered on the 19th of November 1816.* Lady Mary then entered an appeal, 1. Because Reid had no right, without special leave, to be absent from her service for four days; and, 2. Because, as he had not shown any sufficient justification, and it had been proved that he had gone upon his own private business, and as there was no evidence of the alleged general instructions, she had a right forthwith to dismiss him; and consequently he had no claim to wages subsequent to that period. To this it was answered, that he had, in point of fact, been absent on the business of his mistress; and that although he had not obtained special leave to go at the particular time, yet, from former practice, he was led to suppose that this was left to his own discretion. The House of Lords 'Ordered and adjudged that the 'interlocutors complained of be reversed.'

J. CHALMER,—J. RICHARDSON,—Solicitors.

(*Ap. Ca. No.* 10.)

ROBERT DOWIE, Appellant.—*Clark—L'Amy—Brownlee.* No. 29.
JAMES DOUGLAS, Respondent.—*Jeffrey—Hunter.*

Jurisdiction—Consuetude—Reparation.—Held (affirming the judgment of the Court of Session,)—1.—That the Bailies of the burgh of barony of South Leith have, by consuetude, a jurisdiction over the inhabitants of the separate and independent territory of the Citadel of North Leith, notwithstanding a declinature.—2.—That they are entitled to exercise that jurisdiction, when sitting within the territory of South Leith.—3.—That the jurisdiction of burghs of regality, of which the Magistrates of a royal burgh are superiors, is not affected by 20. Geo. II. chap. 43; and,—4.—That damages are due for a blow inflicted with a heavy iron bar on the head, to the danger of life, although the party so struck had previously given a slight blow or push with his hand, and was alleged to have begun the affray.

DOWIE was proprietor of a small house situated in Citadel street, North Leith, which was possessed by the respondent Douglas as his tenant, and his own residence was also in that street. In the month of December 1814, Dowie having gone into the shop of Donald M'Kenzie, smith in North Leith, where Douglas happened to be, a dispute occurred between them relative to the payment of the rent of the above house; and after a good deal of altercation, in the course of which Douglas had made use of some

March 27. 1822.
1ST DIVISION.
Lord Alloway.

* Not reported.

March 27. 1822. irritating expressions, and had given Dowie a slight blow on the shoulder with his fist, the latter took up a heavy bar of iron, and struck Douglas a severe blow upon the head, by which he was knocked to the ground, and his life put in danger. Douglas thereafter brought an action before the Bailies of South Leith, in which he stated, 'That upon the morning of the 20th of 'December 1814, while the pursuer was quietly standing in the 'workshop of Donald M'Kenzie, smith, North Leith, Robert 'Dowie, Citadel street, Leith, did, in a violent and outrageous 'manner, without cause or provocation, strike the complainer 'a blow upon the head with a large bar of iron, in consequence 'whereof he was knocked down and severely wounded, to the 'great effusion of his blood, and manifest danger of his life; 'and he concluded for £500 damages.' Dowie declined the jurisdiction on various grounds to be hereafter stated, but the Bailies repelled them, and, after allowing a proof, found it proved that, 'on the morning of the day libelled, the defender was guilty of a 'barbarous and unjustifiable assault on the person of the pursuer 'in the shop of Donald M'Kenzie, smith in Leith;—that the 'defender struck the pursuer a most severe blow on the head 'with a bar of wrought iron, of the weight of at least 20 lbs;—'that, in consequence of the injury thereby done to him, the pur-'suer was for a fortnight in danger of his life—was for nine 'weeks confined to bed, and for several weeks thereafter inca-'pacitated from gaining his livelihood by working at his usual 'occupation;—that no evidence has been adduced on the part 'of the defender, and that nothing is established by the evidence 'of the pursuer's witnesses, which can be held to justify the con-'duct of the defender, or even in any material degree to alleviate 'his guilt.' They therefore decerned against him for £150 of damages, besides the amount of the surgeon's account, and expenses.—This decree having been extracted, and Dowie having been imprisoned in virtue of it, he brought a bill of suspension and liberation, which was passed. In support of it he contended, 1. That the bailies of Leith, being only bailies of barony, and not independent of the superiors, (the Magistrates of Edinburgh,) had, according to the 20. Geo. II. c. 43, § 17, no power to decide in any civil action to a greater extent than forty shillings sterling; 2. That the Bailies of South Leith had no jurisdiction over North Leith or the Citadel, where he resided, and where the alleged offence was committed, both of these places being within the bounds of the burgh of regality of Canongate, and subject to the jurisdiction of the Magistrates of that burgh, 3. That, supposing that the Bailies of South Leith had a juris-

diction by consuetude over the Citadel, still their decision was null, because it was pronounced when sitting in the court-house of South Leith, and not within the territory of the burgh of regality to which the Citadel belonged; and, 4. That as Douglas was the first aggressor, damages were not due to him; and, at all events, those which had been awarded were excessive. To this it was answered, 1. That the Citadel of Leith was erected into a burgh of regality in 1662, of which the Magistrates of Edinburgh were the supreme lords; and that the jurisdiction was reserved in its full original extent under the 26th section of the statute, by which it was declared that the general enactment should not 'prejudice any jurisdiction or privilege by law vested 'in, or competent to the corporation or community of any royal 'burgh in Scotland;' 2. That the Bailies of South Leith had, from 1709 downwards, exercised a jurisdiction over the inhabitants both of the Citadel and of North Leith, as was proved by the records, and had done so in the court-house of South Leith; and, 3. That, in point of fact, Dowie had been the aggressor; but that, at all events, the slight blow which had been given could not justify the violent assault which was made in return. March 27. 1822.

Lord Alloway found the letters orderly proceeded; and the Court, after being equally divided on the question of jurisdiction, and Lord Alloway having been called in, adhered to his interlocutor on the 30th of May 1817.*—Dowie having appealed on the above grounds, the Lord Chancellor, without making any observations, moved, and the House of Lords 'Ordered and 'adjudged, that the interlocutors complained of be affirmed.'

Appellant's Authorities.—(1.)—20. Geo. II. c. 43. § 17.—1. Ersk. 4. 39; Sheriff Clerk of Renfrewshire, May 27. 1794, (Bell's Cases, 15, and 7714.)—(3.)—1. Ersk. 2. 29; Lawrie, Jan. 21. 1812, (not rep.)—(4.) Hume, 58.

Respondent's Authorities.—(1.)—20. Geo. II. c. 43. § 26.—3. Bank. 10. 43.—4. Ersk. 4. 21.—Maxwell, Dec. 16. 1775, (7281); Begbie, Jan. 26. 1776, (7709);—(2.)—Innes, Dec. 8. 1622, (3110); Innes, Dec. 7. 1622, (3109); Blair, July 1730, (3099.)

SPOTTISWOODE and ROBERTSON,—J. CHALMER,—Solicitors.

(*Ap. Ca. No.* 12.)

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* See Fac. Col. May 30. 1817, No. 118, where the following opinions are reported to have been delivered:— 118

'LORD HERMAND said, he did not think the objection to the jurisdiction well 'founded. The jurisdiction was clearly good before the passing of the act 20. Geo. II. 'c. 43, and it never could be the intention of that act to do away such jurisdiction; 'and he held that the consuetude rendered the jurisdiction good as to the place in 'which it was exercised.

'LORD BALGRAY said, that he did not conceive the jurisdiction not could touch this

No. 30. JAMES GLASS and Others, for the Corporation of HAMMERMEN of LEITH, Appellants.—*Gifford—Baird.*
WILLIAM HUNTER, Respondent.—*Lord Advocate Rae—Cullen.*

Local Militiaman—Stat. 54. *Geo. III. c.* 19.—Held (affirming the judgment of the Court of Session,) that a corporal of the First or Highland Regiment of Local Militia for the county of the city of Edinburgh having volunteered his services, and served at Musselburgh in terms of the above statute, was entitled to the privileges of a freeman, without entering with the incorporation of the particular trade which he exercised.

March 27. 1822.

2D DIVISION. Lord Pitmilly.

BY the 179th section of the 52. Geo. III. c. 68. it is enacted, that 'every person having served in the local militia, when 'drawn out into actual service, being a married man, may set up 'and exercise any trade in any town or place within Great Britain, 'without any let, suit, or molestation of or from any person or persons whomsoever, for or by reason of using or exercising such trade, 'as freely, and with the same provisions, and under the same regulations, and with the like exception to the two Universities in 'England, as any mariner or soldier can or may do by virtue of an 'act passed in the 24th year of his present Majesty's reign.' In 1814, the 'Legislature, by the 54th Geo. III. c. 9, and on the 'preamble that it is highly expedient, in the present circumstances, 'that his Majesty should be enabled to make the most effectual 'use of the disposable military forces in his realms in aid of the

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'case. If there had been no consuetude as to the place where the jurisdiction was 'exercised, there might have been some difficulty upon the other point of the case; but, 'as the fact stood, there could be none; for a clear consuetude had been proved for upwards of 100 years. This being proved, the cases of Portsburgh and the Gorbals 'must regulate the decision of the present question.

'The LORD PRESIDENT observed, that all the cases that had been produced to 'prove a consuetude went only to show that, in such a number of instances, the parties 'had found it convenient to submit to the jurisdiction. In the case of Blair there was 'no declinature, which distinguished it from the present, in which the jurisdiction 'had been objected to ab initio, and consequently had not been prorogated by the 'suspender. His Lordship did not conceive that the Bailies of Leith had any more 'jurisdiction, in questions relating to inhabitants of the Citadel, than the Court of 'Session has in cases of teinds. He, however, concurred in thinking that the jurisdiction, as to its extent, was reserved by the jurisdiction act, as found in the cases 'of Gorbals and Portsburgh.

'LORD BALMUTO having expressed a similar opinion, the cause stood over for the 'decision of LORD ALLOWAY, who said, that although it was quite clear that no 'Judge had a right to exercise jurisdiction extra territorium, yet that full effect must 'be given to an established practice. The Bailies of Leith have exercised this jurisdiction beyond the memory of man. There is no court-house within the Citadel; 'and the uniform practice of the Bailies has been to judge of the Citadel causes. 'The decided cases cited for the charger leave no doubt as to the effect of this established practice.'

'efforts now making upon the continent of Europe; and for that March 27, 1823.
'purpose should be empowered to accept the services of such parts
'of the local militia of Great Britain as may make voluntary offers,
'duly certified by the respective commanding officers, of serving
'under the act, out of the counties within which they shall be en-
'rolled, and as his Majesty may think proper to permit, so to
'extend their service in consequence of such voluntary offers as
'aforesaid,' enacted, 'That it shall be lawful for his Majesty, by
'any order signed by the Principal Secretary of State, directed to
'the commanding officer of any regiment, battalion, or corps of the
'said local militia foresaid of Great Britain, to propose to such
'regiment, battalion, or corps, or any part or parts thereof, so to
'extend their services, under such rules and regulations, and upon
'such allowances, as his Majesty may think fit to make and ap-
'point in that behalf, subject nevertheless to the restrictions
'contained in this act; and it shall be lawful for his Majesty to
'call out and employ from time to time any such parts or pro-
'portions of any local militia so volunteering as aforesaid, at
'such times and in such manner as he shall think fit, out of their
'counties, for any period not exceeding such as are allowed by
'this act.' It was further declared, that this period of 'extend-
'ed service' should not exceed 42 days in any one year, and
'that all the rules, regulations, provisos, powers, authorities,
'penalties, forfeitures, clauses, matters and things in the said
'acts respectively contained as to the local militia, when embo-
'died for service in case of invasion, shall extend and be con-
'strued to extend to the local militia when serving under any
'such voluntary offers under this act, out of the counties within
'which they are enrolled.'

In consequence of this act, a proposal was made to the first or Highland regiment of Edinburgh local militia to volunteer in terms of it, and accordingly they agreed to do so. The respondent Reid was at that time a corporal in the regiment, and he, along with the other officers and soldiers, duly subscribed an obligation to subject themselves to the enactments of the statute. Immediately thereafter a precept was issued by the Lieutenancy of the county of the city of Edinburgh, requiring the regiment to assemble at Edinburgh, with the view of being called out for service, under the 54th of his present Majesty, chap. 19. Previous, however, to the assembling of the regiment, official orders were given to the commander that the regiment was to muster at Musselburgh and Fisherrow, and he was desired immediately thereafter to report himself to the General of the district. These orders were obeyed, and the regiment did duty at these re-

March 27. 1822. spective places (in the neighbourhood of which there was an extensive depôt of French prisoners) for 42 days, the men receiving the marching guinea, and being otherwise put on the same footing as the regular militia. Reid served during that period as a corporal, and received a certificate from the proper officer to that effect, and that he had been called out under the provisions of 54th Geo. III. Having thereafter commenced trade as a blacksmith in South Leith, without entering with the Incorporation of Hammermen, Glass and others, as office-bearers, presented a petition to the Bailies of Leith, praying for interdict, damages, and fine. Decree in absence was pronounced; and a charge having been given to Reid, he brought a suspension, on the ground that he was entitled, by virtue of the above statute, and by having been on actual service, to the privileges of a freeman. Lord Pitmilly suspended the letters simpliciter; and the Court, on the 19th of November 1818, adhered to his interlocutor.* Glass and others then appealed to the House of Lords, and contended that Reid was not entitled to the privileges claimed by him, because the regiment had not been marched out of its county, seeing that it had done duty at Musselburgh, situated in the county of Mid Lothian; and, 2. Because the service was not of that nature for which the benefits and privileges were intended to be conferred, there having been merely an extension of the time for the ordinary annual training, and not that actual service which was contemplated by the Legislature. To this it was answered, 1. That in relation to the militia, the city of Edinburgh is a separate county from that of Mid Lothian, and has accordingly a separate lieutenancy; that Musselburgh is not within the bounds of the county of the city of Edinburgh, but is under a different lieutenancy, and therefore the regiment must be considered as having served out of the county within which it was enrolled; 2. That the regiment was called out for service in terms of and under the provisions of the 54th Geo. III., and that the respondent performed the service required by that statute; and, 3. That having done so, he was entitled to the privileges thereby bestowed. The House of Lords 'Ordered and adjudged that the interlocutors complained of be 'affirmed, with £100 costs.'

Respondent's Authority.—Kirkwood, Jan. 19. 1811, (F. C.)

SPOTTISWOODE and ROBERTSON,—J. RICHARDSON,—Solicitors.

(*Ap. Ca. No.* 18.)

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* Not reported.

JOHN BALFOUR and JAMES GIBSON, Appellants.—*Gifford—Clerk—Moncreiff—Skene.* No. 31.

WILLIAM BORTHWICK, for the East Lothian Bank, Respondent.—*Cranstoun—Lockhart.*

Cautioner.—Cautioners having bound themselves with a Bank agent to be responsible to the Bank for all loss to be sustained through the acts of the agent, but limiting the amount for which they were to be liable to £5000, and the Bank agent having become bankrupt, indebted to the Bank in £15,000, on which a dividend was payable, leaving a balance of more than £5000—Held (affirming the judgment of the Court of Session) that the cautioners were not entitled to insist on the dividends corresponding to £5000 being deducted, and imputed in extinction pro tanto of their debt, or to an assignation to the £5000, so as to draw these dividends.

March 27. 1822.

2D DIVISION. Lord Pitmilly.

IN 1810, Thomsons and Company having been appointed agents in Edinburgh of the East Lothian Banking Company, granted, with Messrs. Balfour and Gibson, a bond for the faithful performance of their duty. By that deed Messrs. Balfour and Gibson bound themselves 'as cautioners, sureties, and full debtors 'for and with the said Thomsons and Company in manner after 'mentioned;' and after reciting that the Bank had appointed 'Thomsons and Company to be agents for doing all the business 'which the said East Lothian Banking Company may have to 'transact in Edinburgh and Leith, by honouring any draughts 'they may make on us, and negotiating bills payable in London, 'negotiating and getting payment of bills payable in Edinburgh 'and other parts of Scotland, and exchanging the notes of the 'said East Lothian Banking Company with the different Banks 'in Edinburgh and Leith: And seeing that it was agreed that 'we should find caution for our intromissions in manner after 'mentioned,' therefore Thomsons and Company, and the individual partners, bound themselves 'to execute faithfully and diligently 'the trust committed to us as aforesaid,' and well and truly to 'account to the said East Lothian Banking Company for all 'sums of money and notes of the East Lothian Banking Com-'pany, or of other Banks, (all which shall be deemed and reckoned 'sums of money,) which we the said Thomsons and Company 'shall be intrusted with:'—'And that we shall pay and deliver 'to the said East Lothian Banking Company &c. all sums of 'money, or other funds or documents whatsoever, belonging to 'the said East Lothian Banking Company, in the custody of us, 'the said Thomsons and Company, when required to do so.'—Then follows this clause: 'And whatever claim may arise to 'the said East Lothian Banking Company against us, the said

March 27. 1822. 'Thomsons and Company, or whatever loss, skaith, damage, or 'expense the said East Lothian Banking Company shall happen 'to sustain or incur by or through us the said Thomsons and 'Company, in any manner of way, in the premises, we the said 'John Thomson and Company as principals, and we the said 'John Balfour and James Gibson as cautioners, sureties, and full 'debtors for and with the said Thomsons and Company (hereby 'renouncing the benefit of discussion) to all and each of us, bind 'and oblige us, &c. conjunctly and severally, to refund, content, 'and pay the same to the said East Lothian Banking Company, '&c., and that immediately upon such claim arising, or upon 'their sustaining said loss, damage, skaith, or expense, with in-'terest,' &c. A clause was then introduced in these terms:— 'But it is hereby provided and declared, that the cautioners be-'fore named are and shall be no further bound and liable, by 'virtue of this present bond of cautionry, than to the extent of '£5000 sterling, payable immediately upon the loss, skaith, da-'mage, expense, or claim arising, and a demand being made upon 'them therefor, with interest, &c.; to which sum of £5000 ster-'ling, with interest and penalty as aforesaid, the foresaid caution 'as to them is hereby expressly restricted, without prejudice to 'the said East Lothian Banking Company, &c. to have recourse 'against us, the said Thomsons and Company, &c. for the full 'amount of the whole loss, skaith, damage, expenses, or claim 'which may be competent to them against us or our foresaids, in 'any manner of way whatsoever, by virtue of these presents.'— The bond then concluded with an obligation by Thomsons and Company to relieve their cautioners in the usual form.

In 1814 Thomsons and Company became bankrupt, and exe-cuted a trust, when it was found that they were indebted to the Bank in upwards of £15,000. For this sum the Bank ranked on their estate, from which a dividend of 4s. 1d. per pound was pay-able. Having made a demand on Messrs. Balfour and Gibson for payment of the full sum of £5000, to which the obligation was limited, the latter stated that they were willing to pay that sum, on receiving an assignation to the dividends corresponding to a ranking to that extent. This proposal was declined, and the Bank then raised an action in name of Borthwick, their cashier, stating that, 'after applying the dividends received or to be 'received upon the said debt by the said East Lothian Banking 'Company, as creditors of the said Thomsons and Company, and 'individual partners thereof, there will still remain of the foresaid 'balance upwards of £5000 sterling due to the said East Lothian 'Banking Company,'—and concluding for payment of that sum.

In defence it was pleaded, that as the Bank had already ranked on the estate of Thomsons and Company for the full amount of their debt of £15,000, Balfour and Gibson were not bound to pay the £5000, except on condition that the dividends effeiring to that sum (if already received) should be deducted and imputed in extinction pro tanto of the claim against them, with a general assignation to the £5000, so as to operate their relief; or if the dividends had not been received, they were entitled not only to the general assignation, but to a special assignment of the dividends. To this it was answered, that, by the terms of the bond, Balfour and Gibson were bound for the loss which might be sustained by the Bank, subject only to the provision that the demand against them should not exceed £5000;—that the total loss was greatly more than that sum, even after giving credit for the dividends, and therefore they had no right to insist that they were liable only for the difference between the £5000 and the amount of these dividends. Lord Fitmilly repelled the defences, and decerned in terms of the libel, 'In respect the bond libelled on, after 'the clause expressing an obligation on the principal debtors to ac-'count to the Bank at all times when required, takes the defenders 'bound as sureties, along with the principal debtors, for whatever 'claim, loss, skaith, damage, or expense, in general terms, may 'accrue to the Bank, it being only provided by a subsequent clause 'that the cautioners shall not be bound, in fulfilling the above-'mentioned obligation undertaken by them, to a greater amount 'than £5000 sterling,—and in respect it is not denied that the 'loss sustained by the Bank, or balance due to them on occasion 'of the bankruptcy of the principal debtors, when the obligation 'of the defenders the cautioners attached, exceeded the said sum 'of £5000: That the defenders are not entitled, in discharging 'their cautionary obligation, to demand deduction of the divi-'dend on the bankrupt estate corresponding to a debt of £5000, to 'the effect of shifting the loss, to this extent, from themselves to the 'pursuers, and of altering the nature and extent of their cau-'tionary obligation: That the dividend must be imputed towards 'extinction of the balance due at the bankruptcy, and that the 'bond imposes on the defenders a cautionary obligation for the 'claim, loss, skaith, and damage remaining due, it being only pro-'vided that the amount of the sum to be paid by them should not 'exceed £5000.'—To this interlocutor the Court adhered on 26th November 1817, and 29th January 1819.*—Balfour and

March 27. 1822.

* See Fac. Coll. Jan. 29. 1819, where it is stated (without giving the opinions of the Judges) that the decision was unanimous

March 27. 1822. Gibson then appealed to the House of Lords on the ground, 1. That the judgments were contrary to the ordinary principles which regulate cautionary obligations, by which a cautioner is entitled, upon paying the sum for which he is bound, to insist for an assignation to the debt, and to all the means of relief which are in the hands of the creditor;—2. That this right of relief is not discharged by the bond, and therefore must be held effectually to subsist; and that the right could not be affected by the circumstance of the Bank having a further claim against Thomsons and Company. To this it was answered, that the general principle was excluded by the terms of the bond,—1. Because by that deed the cautioners were bound, not for any one species or class of transactions, but for the whole conduct of Thomsons and Company in the performance of their agency;—2. Because it provides that the sum which the cautioners are to make good is a sum of loss, skaith, damage, or expense, and that the loss actually sustained exceeded £5000;—and, 3. Because full recourse for the whole loss upon the estate of the principal debtors was reserved to the Bank,—a right of which they could not avail themselves, if they were compelled to assign their claim to the cautioners. The House of Lords 'Ordered and adjudged that the interlocutors 'complained of be affirmed.'

Appellants' Authorities.—Rusforth, 10. Ves. 409; Baillie, 12. Ves. 495.
Respondent's Authorities.—Maxton, Jan. 17. 1777, (No. 1. Ap. Cautioner.)

J. CAMPBELL,—C. BERRY,—Solicitors.

(*Ap. Ca. No.* 14.)

No. 32. ROBERT CARGILL, Appellant.—*Greenshields—Moncreiff.*
CRAIGIE, Respondent.—*Cranstoun—Henderson.*

Sale.—A party having sold an heritable property, on condition, inter alia, that the purchaser should procure him an Ensigncy in the army, and pay a debt affecting the property, and it having been afterwards ascertained that the heritable debt exceeded the sum specified, and that inhibitions had been executed; and the purchaser having refused to procure the Ensigncy till the property was relieved of these incumbrances—Held (reversing the judgment of the Court of Session)—1.—That the purchaser was liable only for interest on the price of the Ensigncy, and not for the pay and emoluments thence arising; and,—2.—That he was entitled to insist, before payment, that discharges of the real burdens should not only be produced, but that they should be duly recorded.

April 1. 1822. CRAIGIE, the proprietor of a house and garden in Dunkeld, agreed to dispone them to Cargill, subject to an heritable debt of £90, on condition that Cargill should procure for him a commis-

2D DIVISION. LordRobertson.

sion as ensign in one of his Majesty's regiments of foot, and pay him £90. Accordingly, on the 22d of September 1807, Craigie executed a disposition in favour of Cargill, who, on the other hand, gave this letter: 'As you have of this date sold your house and 'garden to me, as more particularly described in the disposition 'thereto, I hereby become bound to put you in possession of an 'ensign's commission within a reasonable time from this date, or 'as soon as the forms of the War-Office will admit, and to pay you 'the sum of £90 sterling, upon your making a search of incum-'brances, and satisfying me that there is no other burden upon it 'than a debt of £90 sterling due to Mr. James Fisher; and in the 'event of no other burden appearing, I pay the expense of search; 'if otherwise, you pay.' The disposition and letter were thereupon put into the hands of Patrick Robertson, Cargill's agent, who addressed a letter to Craigie, stating that he was to retain them for his and Cargill's 'joint behoof, until you mutually call for 'the same, after the transaction is completely finished.' The price for which an ensigncy could be purchased at this time was 220 guineas. On searching the record, however, it was discovered that three inhibitions had been executed against Craigie, and that the amount of the heritable debt of £90 was, by arrears of interest, increased to £114; so that the whole debt for which the property was liable was upwards of £300. April 1. 1822.

In the mean while, Cargill had got possession of the disposition from his agent, and having taken sasine, he sold the property to the Duke of Atholl, who completed his titles. Cargill, however, refused to purchase the ensigncy until the property was cleared of the inhibitions, and of the arrears of interest by which the heritable debt had been increased beyond £90. Several arrestments having been thereafter executed against him at the instance of Craigie's creditors, he raised a process of multiplepoinding, and Craigie thereupon brought an action of reduction of the sale both against Cargill and the Duke of Atholl, concluding that the sales should be set aside, or that 'at least the said Robert 'Cargill, defender, ought and should be decerned and ordained 'to procure for the pursuer an ensign's commission in one of His 'Majesty's regiments of the line, as stipulated by the said agree-'ment, and to make payment to the pursuer of the pay which he 'would have got as an ensign from the 11th day of November '1807, when the said commission should have been procured for 'him, and in time coming, till the same shall have been so pro-'cured.' From this action the Duke of Atholl was assoilzied; and Cargill pleaded in defence, 1. That he was not bound to purchase the commission till discharges of the inhibitions were not

April 1. 1812. only obtained, but were duly registered, so as to clear the record of these incumbrances, and until he was relieved of the excess of the heritable debt above £90; and, 2. That, at all events, he was not liable for more than 220 guineas, being the price of an ensigncy at the date of the transaction, and of interest thereon; and this the more especially, as Craigie, from various circumstances, could never have been allowed to hold such a commission. To this it was answered, 1. That regular discharges of the inhibitions had been exhibited and offered to Cargill, but that he had declined to receive them; and, 2. That he had violated the agreement under which the disposition and letter were deposited with his agent, and obtained himself infeft in the property; that he therefore became immediately liable for all the emoluments arising from a commission as an ensign, and that there was no such disqualification as he alleged. The Lord Ordinary, after issuing an interim decree against Cargill for £200, and appointing an investigation as to the terms of the deposit of the disposition and letter, of which Cargill alleged he was entirely ignorant, found 'it 'sufficiently instructed that the defender was acquainted with the 'terms and conditions on which these writings were so deposited; 'and that, notwithstanding thereof, the defender not only entered 'into possession of the subjects, but also got from Patrick Ro- 'bertson the disposition which had been so deposited with him, 'and that the defender thereon completed his titles, and there- 'after sold the subject to the Duke of Atholl;—that it is not al- 'leged by the defender that the Duke of Atholl retained the 'whole or any part of the price, on the ground that the titles 'were not complete, or that incumbrances were not purged;— 'that, in these circumstances, the defender was not entitled to re- 'fuse or delay implement of every part of the stipulated consi- 'deration or price of that subject which he had purchased from 'the pursuer, although he might have retained a sum equivalent 'to the debts with which the subject was affected, until these 'debts and the inhibitions were discharged, and the discharges 'recorded:—that the defender is bound to account to the pur- 'suer for the sum at which an ensign's commission could at that 'time have been procured, minus the sum of £200 already paid: '—and further, that he must account to the pursuer for the pay 'and all the emoluments of an ensign as from Whitsunday 1808, 'the pursuer always being bound to pay to the defender the dif- 'ference between the sum of £90 and the sum actually paid by 'the defender to the heritable creditor as due to him at Martin- 'mas 1807, and to discharge all other real incumbrances affecting 'the subject;' and found the defender liable in expenses. To

this interlocutor the Court adhered, on the 18th December 1817 and 12th May 1818.* Cargill having entered an appeal, the House of Lords found, 'That, under the circumstances of this 'case, the appellant is bound only to account to the respondent 'for the sum of 220 guineas, the sum offered by him as the price 'of an ensigncy, with interest on that sum from the date of the 'sale of the houses and lands in the proceedings mentioned, until 'the payment of the sum of £200 under the order of the Court, 'and with interest for the residue of the said sum of 220 guineas 'from the time of payment of the said sum of £200, subject to 'the deductions herein after mentioned, and the account herein 'after directed; and that the appellant is not bound to account 'to the pursuer for the pay and emoluments of an ensign for any 'period; and that the respondent is bound to pay to the appel-'lant the difference between the sum of £90 and the sum actually 'paid by the appellant to the heritable creditor, as due to him at 'Martinmas 1807, together with interest on the amount of such 'difference; and the Lords find also, that the respondent is 'bound to discharge all other incumbrances affecting the subject: 'And it is ordered that the cause be remitted back to the Court 'of Session, to take the account between the parties according to 'the directions aforesaid, and settle the balance; and it is de-'clared that the appellant is not bound to pay such balance, if 'any, as may appear to be due from him, until proper discharges 'of all real incumbrances on the said houses and lands shall be 'duly recorded; and the Lords further find, that the appellant 'ought not to be made liable for expenses hitherto incurred: 'And it is further ordered and adjudged that the several interlo-'cutors complained of, which are inconsistent with this judgment, 'be reversed: And it is further ordered that the said Court of 'Session do proceed in the said cause as shall be just and con-'sistent herewith.'

April 1. 1822.

J. RICHARDSON,—J. CHALMER,—Solicitors.

(*Ap. Ca. No.* 16.)

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* Not reported.

No. 33.

WILLIAM MACAO, Appellant.—*Warren—Walker.*
OFFICERS of STATE for SCOTLAND, Respondents.—*Gifford—Rae—Wedderburn.*

Foreigner.—Held (affirming the judgment of the Court of Session) that a foreigner who had acquired by transfer shares of the stock of the Bank of Scotland, has no right to the privileges of a naturalized Scotsman, in terms of a clause in the statute 1695 constituting that Bank.

May 10. 1822.

1st DIVISION. Lord Alloway.

BY a statute of the Parliament of Scotland, passed on the 19th July 1695, for erecting a public bank, it was declared, that 'Our 'Sovereign Lord, considering how useful a public bank may be in 'this kingdom, according to the custom of other kingdoms and 'states, and that the same can only be best set up and managed 'by persons in company with a joynt stock, sufficiently endowed 'with these powers and authorities and liberties necessary and 'usual in such cases, hath therefore allowed, and with advice and 'consent of the Estates of Parliament, allows a joint stock, amount-'ing to the sum of twelve hundred thousand pounds money, to 'be raised by the company hereby established for the carrying 'on and managing of a public bank, under the title of The Bank 'of Scotland.' Certain persons were then named, who, or any three of them, 'shall have power to appoint a book for subscrip-'tions of persons, either natives or foreigners, who shall be will-'ing to subscribe and pay into the said joint stock;' and (after mentioning a limited period for doing so) that 'therein all per-'sons shall have liberty to subscribe for such sums of money as 'they shall think fit to adventure in the said joint stock, £1000 'Scots being the lowest sum, and £20,000 Scots the highest; 'and the two thirds parts of the saids stocks belonging alwise to 'persons residing in Scotland.'

After constituting the stockholders an incorporation,—making various rules as to the government and administration of the Bank,—and authorizing transfers of shares to be made, either by assignations or testaments, to be recorded in a book kept by the Bank, and subscribed by the assignee or legatee in token of his acceptance, it is declared, that for preventing 'the breaking of the said 'joint stock and company, according to the design thereof,'—'the sums of the foresaid subscriptions and shares may only be 'conveyed and transmitted by the owners and others, who shall 'become partners of the company in their place, in manner above 'mentioned, or by adjudication or other legal conveyance in fa-'vours of one person allenarly, who, in like manner, shall succeed 'to be a partner in his predecessor's place, so that the foresaid 'sums of subscriptions may neither be taken out of the stock, nor

'parcelled amongst more persons by legal diligence, in any sort, May 10. 1822.
'to the diminishing or disturbing the stock of the said company,
'and good order thereof.' The statute, after several other provisions, concludes with the following clause: 'And it is likewise 'hereby provided, that all forraigners who shall join as partners 'of this Bank shall thereby be and become naturalized Scotsmen 'to all intents and purposes whatsoever.' By the statutes 14. Geo. III. c. 32.—24. Geo. III. c. 8.—32. Geo. III. c. 25.—34. Geo. III. c. 19.—and 44. Geo. III. c. 23., various provisions in favour of the Bank were made; and it was by all of them declared that the statute 1695 should remain in full force, in so far as not thereby altered. By the latter of them it was enacted, that in future all sums relative to the affairs of the Bank should be stated in sterling money, and that the stock should be divided into shares different from those mentioned in the original statute; but no repeal of the above clause as to foreigners was made.

In 1818, Mr. William Macao, a native of China, who had resided in Scotland during the greater part of his life, purchased certain shares of the Bank stock; and soon thereafter he raised an action of declarator against the Officers of State, in which, after narrating 'that the pursuer, a foreigner, became a partner 'of the said Bank by purchasing certain shares of the capital stock 'thereof, with a view that he might enjoy all the privileges and 'immunities of a naturalized Scotsman and British subject to all 'intents and purposes whatsoever;—that the pursuer having of 'late understood that some doubts are entertained how far his 'being a proprietor of the joint stock of the said Bank has the 'effect of bestowing upon him the privileges of a naturalized 'Scotsman and of a naturalized British subject, or freeing and 'relieving him from the disabilities, burdens, restrictions, and 'provisions imposed by the common law, or by the several acts 'of Parliament in respect of foreigners and aliens, as above men-'tioned, has become greatly alarmed;' and therefore he concluded, 'that the pursuer, although a foreigner, born in a country 'not under or subject to the laws of our realm, as a consequence 'of his having become a partner in the said Bank, by purchasing 'certain shares of the joint stock thereof, has become a naturalized Scotsman, and, as such, a naturalized British subject, to 'all intents and purposes whatsoever, in terms of the said statute 'before quoted, and that he is entitled to all the rights and pri-'vileges belonging or competent to any other naturalized Scots-'man and British subject.'

Against this action the Officers of State pleaded in defence, that the pursuer had no right to the privileges claimed by him; 1.

May 10. 1822. Because, under a sound construction of the statute 1695, the privilege of naturalization in Scotland was bestowed only on such foreigners as contributed to the original establishment of the Bank by joining as partners in it, and not on those who, like the pursuer, had acquired right by subsequent transfer;—that the object of the Legislature was to overcome the first difficulties in the institution of this Banking Company;—that it was with a view to that object that the privilege of naturalization was held forth to foreigners;—that accordingly it appeared, that in all the other statutes by which such a privilege was conferred on those who were engaged in manufactures or other public works, it was limited to those who had set up or established them;—and that it could never have been intended that all those who might at any future period acquire right to a share of the Bank stock, whether residing in Scotland, or in any other part of the world, should thereby become naturalised Scotsmen. 2. Because, on the supposition that the privilege could be so acquired by transfer, the provision of the statute 1695 became inoperative, and was repealed by the treaty of Union;—that, by that treaty, it was no longer possible for any person to be naturalised as a Scotsman, all distinction being taken away, so far as regarded allegiance and their respective public rights, between Scotsmen and Englishmen;—and that as it is impossible to bestow naturalisation in Scotland, without necessarily inferring naturalization in England, effect could not be given to the clause of the statute 1695, without bestowing a right and privilege different from and more valuable than that which it contemplated, and without violating the sixth article of the Union. 3. Because by the statute 44. Geo. III. c. 23. the privilege claimed was by implication necessarily extinguished and repealed, seeing that the old division of the stock having been thereby abolished, there no longer existed that peculiar and defined statutory property on which the privilege was conferred. And, 4. Because the privilege claimed was contrary to the constitutional law of the kingdom, as established by a long course of British legislation;—that, accordingly, the clause on which it was founded had fallen into complete oblivion and nonuse;—that whether or not it was done away by the principles of desuetude, it was at least inconsistent with various British statutes;—and that, were effect to be given to the privilege under the statute 1695, a foreigner, even although a Roman Catholic, and not residing within the kingdom, might be qualified to hold the highest offices in the State.

In answer to these defences, it was contended by the pursuer, 1. That the clause of the statute was perfectly general, and

that there was no authority for limiting the privilege thereby conferred to the original partners or subscribers, the words being of a prospective nature, 'That all foreigners who shall join as 'partners of this Bank shall thereby be and become naturalized 'Scotsmen, to all intents and purposes whatsoever.' 2. That the clause was not affected by the treaty of Union, but that, on the contrary, (after enumerating various particular laws, among which the statute 1695 was not included,) it was declared by the eighteenth article, that 'all other laws in use within the king-'dom of Scotland do, after the Union, and notwithstanding 'thereof, remain in the same force as before.' 3. That the statute was confirmed by five British statutes, and that in none of them was there any repeal of the clause in question, and that the right thereby conferred could not be affected by the alteration on the amount of the shares; and, 4. That it was not abrogated by desuetude, nor was the privilege at all inconsistent with the principles of the constitution, or the course of legislative enactments, because a similar right was conferred by statute on sailors and others who had served for a specified period under the British Government, without reference to their religion or residence. May 10. 1822.

The Lord Ordinary found that 'it is provided by the statute '1695 for erecting a Bank in Scotland, 'That all foreigners who "shall join as partners of this Bank shall thereby be and become "naturalized Scotsmen to all intents and purposes whatsoever;' 'and that as this statute applies not only to the subscription, 'but to the conveyance or transference of that subscription, 'by no rule of interpretation can this privilege, which is contained 'in the last clause of the statute, be limited and restricted to 'original partners, as foreigners might join as partners of the 'Bank, as well by transference as by original subscription: That 'no part of this act can be held to be in desuetude, as not only 'are all the privileges at present possessed by the Bank conferred 'by the statute, but it has been five times renewed by British 'acts of Parliament since that period, increasing the capital of 'the Bank, in all of which it is provided that the said act of the 'Scottish Parliament in the year 1695 shall remain in full force 'as to every particular, except in so far as the same is altered by 'these different acts, and shall operate with regard to the increased 'capital in the same manner as in the old capital: That this 'statute 1695 was not repealed by the articles of Union, but that 'all persons who had acquired rights under that statute, or who 'might afterwards acquire them, were not thereby affected, ex-'cept in the same manner that other Scotsmen were: Therefore

May 10. 1822. 'found that the pursuer, having joined as a partner of the Bank, 'is, while he remains a partner thereof, a naturalized Scotsman 'to all intents and purposes whatsoever, and decerns and declares 'accordingly.'

Against this interlocutor the Officers of State presented a petition to the Court, who, after ordering the opinions of Mr. Sergeant Lens, Mr. Sergeant Copley, Mr. Scarlett, and Mr. Warren, to be taken as to how far certain 'acts of the Parliament of Eng-'land, referred to in the petition and answers, are considered to 'be affected by the articles of Union, and how far they are now 'in force,' appointed a hearing in presence before the whole Judges of both Divisions, including the Lords Ordinary. After the hearing was concluded, the following questions were ordered to be laid before the consulted Judges:—

'1. Is the privilege of naturalization conferred on foreigners 'joining as partners of the Bank, by the act 1695, confined to 'such as were original subscribers; or does it extend to such fo-'reigners as might afterwards acquire shares of the Bank stock 'by purchase, succession, or otherwise?

'2. In either of the above cases, is the privilege limited, in 'point of time, to the period during which the foreigner conti-'nues to hold such share of Bank stock?

'3. Can the pursuer, under the act 1695, be now found to be 'a naturalized Scotsman, in contradistinction to a naturalized 'British subject?

'4. Is the act 1695 abrogated or superseded, in its operation 'quoad the principle of naturalization, by the treaty of Union 'between Scotland and England in 1707?

'5. Supposing it not to be abrogated by the Union, is it abro-'gated by the 44. Geo. III. c. 23. which breaks down the amount 'of shares to which it was originally attached, and allows the 'divisibility of stock ad infinitum?

'6. Is the act 1695, quoad this privilege, fallen into desuetude; 'or is the admitted disuse only to be taken as an argument in the 'interpretation of the statute?

'And, 7. Is the privilege in question reserved by the 18th, or 'any other article of the treaty of Union; or is it reserved by 'any of the British statutes passed for increasing the capital of 'the Bank?'

Lords Justice-Clerk, Cringletie, and Meadowbank, and Lord Craigie, (subject to an explanation as to the third question,) returned the following answers:—

Question 1.—We, the undersigned, are of opinion, upon due consideration of the act 1695, which authorizes a book to be opened for re-

ceiving the subscriptions of persons, either natives or foreigners, who May 10. 1822.
shall be willing to subscribe and pay in to the joint stock of the intended Bank, according to the amount of shares therein mentioned, under the provision of two-thirds of the said stock always belonging to persons residing in Scotland, that the privilege conferred by the last section of the statute, 'That all foreigners who shall join as partners of this Bank 'shall thereby be and become naturalized Scotsmen to all intents and 'purposes,' was confined to those who should originally join as partners in subscribing for the joint stock, and that it did not extend to others who might afterwards purchase, or otherwise acquire shares, and who, in order to prevent the breaking of the said joint stoc and company, it is provided by the act, shall become partners in the place of the former holders of the shares so acquired.

Question 2.—We are of opinion that the privilege, when once acquired, was not limited to the period during which the foreigner continued to hold a share of Bank stock.

Question 3.—We are of opinion that, under the act 1695, the pursuer cannot be declared to be a naturalized Scotsman, in contradistinction to a naturalized British subject.

Questions 4. *and* 7.—We are of opinion that the privilege conferred by the act 1695, being confined to the original partners, was not taken away by the treaty of Union from any of them; but if that privilege could be considered as conferred upon all foreigners who might *acquire shares*, and thereby become partners of the Bank subsequently to the date of the act, we are of opinion that the Union did abrogate the privilege, as establishing a mode of naturalization inconsistent with the terms of the articles of that treaty.

Question 5.—We are of opinion that the 44. Geo. III. c. 23. cannot be held to have made any alteration upon the privilege, if it then existed, as the 13th section provides that the former acts should remain in full force, 'except in so far as any of them have been altered by any 'subsequent act, or by the present act.'

Question 6.—We are of opinion that as no sufficient evidence, establishing a practice in opposition to the privilege, has been laid before us, the admitted disuse is only to be taken as an argument in the interpretation of the act 1695.

Lords Glenlee (subject to an explanation as to the third question) and Pitmilly gave the following answers:—

We concur in the above opinion, with the following exception as to the first question, and explanation as to the fourth.

As to question first, we do not think that the terms of the act 1695 warrant the conclusion that the privilege conferred by that statute was confined to such as were original subscribers.

And, in answer to question fourth, we think the act 1695 is superseded, in its operation quoad this principle of naturalization, by the act of Union, in the case of all foreigners who have purchased or may pur-

May 10. 1822. chase Bank of Scotland stock since the Union,—but that it was not superseded in the case of foreigners who made such purchase before the Union.

The explanation referred to by Lords Craigie and Glenlee was in these terms:—

Although we concur in the answer which has been made to question third, in the terms in which it has been conceived, we wish to be understood as not anticipating the result of a declaratory action for having it found that the act 1695 is still effectual to confer on such foreigners as (if it were not for the Union) would have been naturalized by it, any advantages in Scotland which it can be shown are not inconsistent with the true spirit of the Union, considered as a mutual contract between the two nations.

Lords Banpatyne, Gillies, and Alloway answered:—

Question 1.—We do not think that the privilege conferred on foreigners by the act 1695 is confined to such as were original subscribers.

Question 2.—This question appears to us to be attended with much difficulty; and not having heard it fully argued, as in truth it does not arise in the present case, we are hardly prepared to make an answer satisfactory to our own minds on the subject. At present, we rather think that the privilege is limited to the period during which the foreigner continues to be a holder of Bank stock.

Question 3.—We do not think that the pursuer can be found to be a naturalized Scotsman, in contradistinction to a naturalized Briton; but we think that it is competent for a Scotch Court to find that he is a naturalized Scotsman, or a naturalized subject of the King in Scotland, leaving it open to other tribunals to determine whether he has thus acquired the whole privileges of a naturalized British subject.

Question 4.—We are of opinion that the act 1695 is not abrogated or superseded in its operation by the treaty of Union, as it does not appear to us to be contrary to, or inconsistent with that treaty. If the treaty of Union has abolished, so far as regards the rights of citizenship, all distinction between Englishmen and Scotsmen, and if it is to be held that, in consequence of the treaty of Union, the two nations now compose only one united nation of Britons, we think that the effect of that treaty is not to abrogate or supersede the act 1695, but to extend its operation to the United Kingdom, so as to communicate the rights of naturalized Britons to those who, prior to the Union, were declared by this act of Parliament to be and become naturalized Scotsmen.

Question 5.—We think that the act 1695 is not abrogated by the act 44. Geo. III.; but we think it extremely doubtful whether the privilege conferred by the act 1695 would belong to a foreigner holding a share of Bank stock, smaller than that share to which the privilege was originally attached.

Question 6.—We are of opinion that the act 1695 has not fallen into desuetude.

Quæstus 7.—We think that the privilege in question is reserved by the article in the treaty of Union, and the British statutes here referred to. May 10. 1822.

Lord Bannatyne subjoined this explanation:—

In explanation of my signature to the above, I think it right to add, that my opinion concurs with that of the other two Judges who sign it, respecting all the questions but the second, as to which I rather incline to hold that the privilege acquired under the statute by a foreigner purchasing Bank stock would be permanent, and continue to be held, notwithstanding its being afterwards disposed of.

Thereafter the Court, on the 14th of November 1820, on advising these opinions, 'Altered the interlocutor reclaimed against, 'sustained the defences, and assoilzied the defenders from the 'whole conclusions of the libel, and decerned and declared accordingly.'* The pursuer having entered an appeal against this judgment, the House of Lords 'Ordered and adjudged that 'the interlocutor complained of be affirmed.'

Lord Chancellor.—In this case, my Lords, in which William Macao is the appellant, and his Majesty's Officers of State are the respondents, the appellant's summons, after mentioning that a private act of Parliament passed in 1695, and which was the original act, states the particular objects of that act of Parliament,—particularly that certain persons therein named, and, in the case of the decease of any of them, the persons to be chosen by the survivors, 'shall have power to appoint a book for subscriptions of persons, either natives or foreigners, 'who shall be willing to subscribe and pay into the said joint stock; 'which subscriptions the foresaid persons, or their quorum, are hereby 'authorized to receive in the foresaid book, which shall be open every 'Tuesday or Friday from nine to twelve in the forenoon, and from three 'to six in the afternoon, betwixt the first day of November next and 'the first day of January next following, in the public hall or chamber 'to be appointed in the city of Edinburgh; and therein all persons shall 'have liberty to subscribe for such sums of money as they shall think fit 'to adventure in the said joint stock, one thousand pounds Scots being 'the lowest sum, and twenty thousand pounds Scots the highest, and 'the two third parts of the said stock belonging always to persons residing in Scotland.' Their capital, it is declared, is to amount to

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* See Fac. Coll. Nov. 14. 1820, where reference is made to the opinions of the Judges as being bound up with the session-papers. From these it appears that Lords President, Balmuto, and Succoth held,—1. That the privilege was limited to the original subscribers, and was not transferable;—2. That even if it were transferable, the statute was, quoad hoc, virtually repealed by the Union;—3. That, such being the case, the subsequent statutes did not affect the question;—and, 4. That although the principles of desuetude were not precisely applicable, yet the disuse formed an argument to show that the privilege was not transferable. Lord Hermand dissented on each of these points.

May 10. 1822. twelve hundred thousand pounds; and it then goes on to provide for a certain portion of the sums subscribed being paid at the time of subscribing, and to erect the subscribers into a body corporate and politic by the name of 'The Governor and Company of the Bank of Scotland.'

Then, by one of the clauses, and with the view of encouraging foreigners to become purchasers in this joint stock company, it is enacted and provided as follows: 'And it is likewise provided, that all foreigners 'who shall join as partners of this Bank shall thereby be and become 'naturalized Scotsmen to all intents and purposes whatsoever.' The appellant takes no notice of the subsequent acts of Parliament; and though the subsequent acts of Parliament may in some respects be considered as private, yet upon the whole they are public, and therefore I take it for granted they were judicially to be taken notice of in the Courts of Scotland. He then states, 'That the pursuer, a foreigner, 'became a partner of the said Bank, by purchasing certain shares of the 'capital stock thereof, with a view that he might enjoy all the privileges 'and immunities of a naturalized Scotsman and British subject, to all 'intents and purposes whatever.'

My Lords, what the privileges and immunities of a naturalized Scotsman are, I am not quite aware of. I think that should rather appear from the act which was passed with respect to the original shareholders. But I should think it has not been the constant course, when persons have been naturalized in Scotland, to give them all the privileges and immunities of native-born subjects; but that, when persons have been naturalized there, the privileges they were thereby entitled to were somewhat short of those enjoyed by native-born subjects. It is perfectly clear, however, I think, that if the person naturalized in Scotland has all the privileges of a native-born Scotsman since the Union, that he is privileged beyond any person who is naturalized here: For we know that persons who are naturalized here, notwithstanding such naturalization, have certain disabilities about them which do not belong to British-born subjects, being incapable of being members of the Privy Council or of Parliament, or of holding office, and so on. The summons then states, 'That the 'pursuer, having of late understood that some doubts are entertained how 'far his being a proprietor of the joint stock of the said Bank has the ef- 'fect of bestowing upon him the privileges of a naturalized Scotsman, and 'of a naturalized British subject, or freeing and relieving him from the 'disabilities, burdens, restrictions, and provisions imposed by the common 'law, or by the several acts of Parliament in respect of foreigners or 'aliens, as above mentioned, has become greatly alarmed: That, therefore, 'and in order that the said doubts may be removed, and the true intent 'and meaning of the provisions of the said statute, entitled "An Act for "erecting a Public Bank,' may be fully known and declared, the pursuer 'has been advised to institute the present action of declarator.' By which passage in the summons, I suppose they mean by 'the true in- 'tent and meaning of the provisions of the said statute,' as they can be

collected not only from the contents of the particular statute for erecting a public bank, but also from the other statutes which have been made since the Union, and which are pari passu; and then it proceeds: 'Therefore, and for other reasons to be proponed at the discussing hereof, it ought and should be found and declared, by decree of our Lords of Council and Session, that the pursuer, although a foreigner, born in a country not under or subject to the laws of our realm, as a consequence of his having become a partner in the said Bank, by purchasing certain shares of the joint stock thereof.'—Then I must take it for granted that he became a partner in that Bank subsequently to the Union. The inserting of that would have been considered, perhaps, as so much surplusage; but I think we may supply that; I dare say it was pleaded. The summons then goes on, 'has become a naturalized Scotsman, and as such a naturalized British subject, to all intents and purposes whatsoever, in the terms of the said statute before quoted, and that he is entitled to all the rights and privileges whatsoever belonging or competent to any other naturalized Scotsman and British subject.' Here, again, we may observe the difficulty which occurs from our not having a more particular statement of what are the privileges of a naturalized Scotsman and of a naturalized Englishman. Then they are to pay some damages, which I suppose is a mere matter of form. May 10. 1822.

Now, my Lords, before I approach the merits of the case, it does appear to me to be a matter of consequence to consider, whether a case upon such a summons is maintainable; and though I cannot presume to say the summons may not be maintainable according to the laws of Scotland, yet I feel extremely unwilling to admit that it is a summons which can be maintained here. I should like to know whether there is any instance, since the Union, of a declarator against the Officers of the State. I am not informed. I am ignorant of that fact. There have been summonses of declarator subsequent to the Union, but I very much doubt whether these has been an action of declarator against the Officers of State with respect to a public right such as this, and where the direct object of the action of declarator is to have it determined by the Court of Session of Scotland, whether a person naturalized in Scotland is to have the rights and privileges of a British subject. Incidentally and collaterally, according to our forms of proceeding, I must admit they would have had a right. If, for instance, this gentleman had brought an action against the corporation of which he was a partner, desiring to have his share of the profit, and they had alleged that he had not the national character of a British subject, as he ought to have had; then, with a view to determine his right with regard to benefit, they might have determined whether he was or was not a British subject. But whether, on a declarator of this sort, they can determine that he is a British subject, or not a British subject, is a question upon which I entertain considerable doubts.

May 10. 1822. I have looked at this act of Parliament as an act of Parliament which is to be construed by seeing what the effects of it would be, if the construction contended for were to be considered as the true one, and also by seeing what the Parliament has done in various subsequent acts; and then I have endeavoured to ask myself this question, What must have been the notion of the British Legislature in passing these subsequent acts of Parliament? And having so done, in order to see whether this person was or was not to have the benefit of that act of 1695, I have no doubt, after looking over the various acts of Parliament, that he was not; and I cannot help thinking the passage which the pursuer has last referred to makes more against him than for him. I think that it was only meant to apply to the original subscribers. In looking into the first act of Parliament, the capital is limited to £1,200,000, and it provides that no subscriber should have more than twenty shares, or less than one of £1000 each; but, even in that state of things, with this limitation of the mischief which might accrue by the introduction of subsequent purchasers, it would be infinitely less scaring to the public than the matter is now left without any limitation which can possibly be looked to under the subsequent acts. I confess it does seem impossible that the Legislature, in the three or four subsequent acts of Parliament which it passed, when those clauses were introduced as to the amount of shares, could have intended that any man holding a share of £1 or £15, or whatever share he might think proper to purchase, should be entitled to such privilege. I think that the Legislature, when it passed this act of Parliament at the Union, did it with the greatest caution, intending that no persons but the original subscribers should receive that benefit; for the Legislature must have seen that if it was not so, the effect of it might be, that naturalized foreigners, by the means of property, and the circulation of property, might be multiplied to any extent whatever by the subdivision of this million of money —an effect which could hardly have been the intention of the Legislature. But I think there are expressions in the act which show, in some measure, that the Legislature really intended it only to extend to the original subscribers, unless you put it in another way, and infer that the Legislature were satisfied that the act of Union had destroyed the effect of the clause; so that, putting it either way, it does appear to me, either that the effect of the act of 1695 was confined to the original proprietors, or that the act of Union has taken away the effect of the clause in the act of 1695; and therefore I think that the interlocutor of the Lord Ordinary cannot stand, and that the judgment of the Court of Session must be affirmed. There are a great many important observations which might be made respecting the act of Union, but it is not my intention to go any further, unless any of your Lordships should disagree with me.

Lord Redesdale.—My Lords, I would observe, that whatever the Court of Session may have done, unless I receive information different

from what I have done, I think it is perfectly clear that the Court of Session had no jurisdiction on the subject of such an action as this. This is an action of simple declarator. Now, all the reservation to the Court of Session by the act of Union is the power which they had before, and before the Union they had no power to declare in such an action of declarator. From what was the law of England on the subject, both before and since that Union, I cannot conceive they had any power so to declare when they became a part of the United Kingdom, for all that was reserved to them was a reservation of the same power in Scotland which they had before expressly confined to Scotland, and therefore confined to the local law of Scotland. Throughout the whole of the argument, it appears to me that there has not been a sufficient distinction taken between the public law of a country and the local law. The public law is that which is the law of the whole country; and when you apply to the local jurisdiction, that local jurisdiction can have no power to act, with respect to the public law, except incidentally. It can have no power of declaring, as it seems to me, on principle, what is the public law of the whole empire. May 10, 1822.

My Lords, the importance of this question is certainly very great; because, if this power is inherent in the Court of Session, the consequence is, that there is no matter of public law affecting the whole kingdom which the Court of Session may not declare on, and if it cannot declare on the general law of the land, it is totally inefficient. If it had the power to make such a declaration with respect to public law before the Union,—that is, the public law of Scotland before the Union,—yet it does not follow that that power can properly be vested in the Court of Session subsequent to the Union, when the Court of Session became a Court of local jurisdiction, and not of general jurisdiction. But if it is a local jurisdiction only, it is inconsistent with the constitution of the country; for there can be no general declaration of the public law but by the public Parliament, consisting of King, Lords, and Commons assembled. It is therefore a great constitutional question, and a question which never can be decided by the Court of Session, as, since the Union, it must be decided on just public grounds. And I therefore feel bound to declare my opinion, and, as far as I am at present informed, I do declare a clear opinion, that the Court of Session, on a simple action of declarator, had no jurisdiction on this subject. There is nothing can convince me more clearly than this, for who are the persons called to support this action? What right have the Officers of State in Scotland to decide that question, which involves the right of all the persons in England? I conceive such an action of declarator must be brought, as the law of Scotland is, against persons who are competent to sustain the question. But how can the Officers of State of Scotland sustain a question which concerns the whole United Kingdom? My present opinion is, that the Court of Session had no such jurisdiction on the subject of an action of simple declarator.

May 10. 1822. This question may come under what the Noble Lord alludes to with respect to Americans (in consequence of what has passed particularly in the United States by the independence of the United States) in this country who are not British subjects. The Court of Session in Scotland would have an equal right to declare in that case as it has in this case, if this case can be sustained. I conceive it is a question of the utmost importance, and every thing which has been done by the Court of Session on the subject cannot in my mind establish such a jurisdiction. It would be establishing a great principle which cannot stand in this case, and nothing more fully confirms me in my view of it, than that the learned counsel have not at all grappled with that argument.

Pursuer's Authorities.—1.—1. Ersk. 1. 55.; 2. State Trials, p. 594; 22. Geo. II. c. 45; 7. Anne, c. 5; 10. Anne, c. 5; 4. Geo. II. c. 21; 13. Geo. III. c. 21.—(2.)—1. Term. Rep. p. 44; 15. Cha. II. c. 15; 11. and 12. Will. III. c. 6; 25. Edw. III. c.—; 3. Ersk. 10. 10.—(3.) —4. Term. Rep. p. 2. 4.—(4.)—3. Ersk. 7. 10.

Defender's Authorities.—(1.)—1. Voet. 4. 17; 1. Ersk 1. 53. 55; 1. Coke, 129; 1669, c. 7; 1661, c, 39; 1661, c. 40; 1681 c. 12.—(2.)—1. Bank. p. 61—63; Lealie, June 8. 1749, (4636—4641, and Elch. 45. Foreigner.)—(4.)—1. Geo. I. c. 4; 13. Geo. II. c. 7; 20. Geo. II. c. 44; 4. Geo. III. c. 25; 14. Geo. III. c. 84; Muir and others, Jan. 15. 1791,* (Bell on Election, p. 484.)

J. RICHARDSON,—J. CHALMER,—Solicitors.

(*Ap. Ca. No.* 20.)

No. 34. Hon. MARY F. E. STEWART MACKENZIE and Husband, Appellants.—*Warren—Clerk—Adam.*

Hon. FRANCIS C. E. S. K. MACKENZIE and Others, Respondents.—*Jeffrey—Moncreiff.*

Entail.—An entail having been made in favour of A. and his heirs,—whom failing, B. and his heirs,—whom failing, C. and his heirs,—and the fetters applied nominatim to A., but only by the descriptive terms 'heirs and substitutes of entail, and successors' to the others; and A. and B. having predeceased the granter, on whose death the entail was to take effect—Held that C. was bound to make up titles, subject to the limitations of the entail.

May 18. 1822. 2D DIVISION. Lord Craigie.

FRANCIS LORD SEAFORTH had two sons, William Frederick Mackenzie and Francis John Mackenzie, and six daughters, of

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* This case is only noticed by Mr. Bell in his Book on Election, who mentions that he had been unable to obtain the interlocutor pronounced by the Court. It was in these terms: 'The Lords having, &c. Dismiss the complaint in so far as concerns 'William Muir; sustain the objection to the election of Khlein, and find that, as being 'an alien, he was ineligible; and therefore reduce his election as a councillor of the 'burgh of Burntisland, dismiss the complaint, and decern.'

whom the appellant (formerly the wife of Sir Samuel Hood, and now of Mr. Stewart of Glasserton) was the eldest. In May 1810, and when all his children were alive, Lord Seaforth executed an entail of his estates, on the narrative of 'being minded and 'desirous to make suitable provision for the payment of my debts, 'and for my wife and children, with due regard to my title and 'dignity, and to the preservation of my estate, and of my name 'and family.' He then proceeds to 'give, grant, dispone, and 'convey to William Frederick Mackenzie, my eldest son, and 'the heirs-male of his body,—whom failing, to Francis John 'Mackenzie, my second son, and the heirs-male of his body,— 'whom failing, to the other heirs and substitutes herein after ad- 'pointed to succeed to my lands and estates in Scotland, in the 'order in which they are herein appointed to succeed thereto,'— all and sundry his estates, real and personal, which should belong to him at the time of his death; and he appointed, 'that whatever 'sum or sums of money shall come to the hands of the said Wil- 'liam Frederick Mackenzie, or of the heirs-male of his body, 'or of the said Francis John Mackenzie, or of the heirs-male of 'his body, or of any other heirs or substitutes appointed to succeed 'to my lands and estates in Scotland, in manner herein after 'mentioned and set forth, from the share belonging to me in 'certain lands, tenements, and hereditaments in the colony of Ber- 'bice, South America, with the appurtenances thereof, shall be ap- 'plied, in the first place, towards payment of my debts,' &c.—This is followed by a particular disposition of his estate in Scotland, and an enumeration of the classes of heirs in these terms: 'And 'without prejudice to the said generality, but for the purpose of 'completing my intention with respect to my lands and estates in 'Scotland, I hereby give, grant, dispone, and convey to and in 'favour of the said William Frederick Mackenzie, my eldest son, 'and the heirs-male of his body; whom failing, to the said 'Francis John Mackenzie, my second son, and the heirs-male of 'his body; whom failing, to any other son or sons to be pro- 'created of my body successively; and the heirs-male of the body 'of such son or sons respectively; whom failing, to the heirs what- 'soever of the body of the said William Frederick Mackenzie, 'my eldest son; whom failing, to the heirs whatsoever of the body 'of the said Francis John Mackenzie, my second son; whom fail- 'ing, to the heirs whatsoever of the body of any other son or sons 'to be procreated of my body, successively, in their order of seni- 'ority; whom failing, to Mary Frederica Elizabeth, my eldest 'daughter, wife of Sir Samuel Hood, Knight of the Bath, Rear- 'Admiral of the White, and the heirs whatsoever of her body;'

May 13. 1822.

May 13. 1822. whom failing, to his other daughters (the respondents) in their order, the eldest heir-female always excluding heirs-portioners, and succeeding without division throughout the whole course of succession. The substitution of heirs is terminated thus: 'Whom 'failing, to any heirs-male whatsoever, being heirs-male of the 'body of Colin Fitzgerald, the predecessor of my family, who lived 'in the reign of Alexander III. King of Scotland;'—'but always 'with and under the burdens and provisions, and subject to the 'conditions, declarations, restrictions, limitations, and clauses 'irritant and resolutive, hereafter mentioned and expressed.'

This deed was accordingly fortified by clauses irritant and resolutive, directed in some instances against 'the said William 'Frederick Mackenzie, and every heir of entail succeeding to the 'said lands and estate;' in others, against 'the said William 'Frederick Mackenzie, and the heirs-substitutes and successors 'before mentioned.' And it was declared that, in the event of contravention, 'the persons so contravening or failing to fulfil,' &c. shall amit, lose, &c. 'And the persons so succeeding upon 'the contravention shall be subject to the same restrictions, pro-'hibitory limitations, and clauses irritant and resolutive, to which 'the said Frederick William Mackenzie, and the heirs-substitutes 'and successors before mentioned, are to be subject and liable 'through the whole course of succession.' He then obliged himself 'to infeft and seize the said William Frederick Mackenzie, 'and the heirs of entail before specified, with and under the bur-'dens and provisions, and subject to the conditions, declarations, 'restrictions, limitations, clauses irritant and resolutive, herein 'before expressed; dispensing however with delivery, reserving 'a power to alter or revoke, and declaring that the deed should 'be valid and effectual, though found in his custody at his death.'

His two sons predeceased him without issue; and his Lordship, without having any other sons, died in 1815, at which time the entail was found in his repositories, unaltered and unrevoked. The appellant, his eldest daughter, thereupon obtained a general service as nearest and lawful heir of tailzie and provision, duly recorded the deed of entail; and in virtue of the unexecuted precept of sasine contained in that deed, and of the retour of her service, she was afterwards infeft.

In the course of completing her title, however, it occurred to her that she had acquired right to the estate, not as an heir under the entail, but as an institute or disponee, and that the fetters did not apply to her. She therefore brought an action of declarator, in which she concluded, that in consequence of her two brothers having predeceased her father without issue, it

should be declared 'that the pursuer is institute, conditional 'institute, or disponee of the said lands and others, and as such 'has obtained right to the said disposition, and the unexecuted 'procuratory of resignation and precept of sasine therein con- 'tained, and is thereby entitled either to take a valid infeftment 'upon and in virtue of the said precept of sasine, and the decree 'to follow hereon, which may be followed by charters of confirm- 'ation from the superiors of the pursuer in the said lands or 'others, or, on the procuratory of resignation in the said dispo- 'sition, to obtain from the said superiors charters of resignation:' And farther, 'That the said general service of the pursuer as heir 'of tailzie and provision to her father, and the infeftment taken 'and recorded as before mentioned, are inept and irregular, and 'do not operate as any bar to the pursuer of new taking infeft- 'ment, or expeding any other title upon the said disposition, in 'virtue of the decree to be obtained hereon; and the pursuer, as 'institute, conditional institute, or disponee, is entitled to hold 'the lands and others in fee-simple, and free from the fetters of 'the entail.' May 13. 1812.

In defence against this action, the younger daughters of Lord Seaforth, and substitutes in the entail, pleaded, 1. That the succession did not open to their sister as institute, conditional institute, or disponee, but as an heir or substitute; and 2. That although she were to succeed in either of the characters assumed by her, she would not be entitled to hold the estates in fee-simple, the whole fetters of the entail being effectual against her, in whatever character the succession might open to her. In support of the first of these pleas they stated, that laying aside any inquiry as to the application of the fetters to her, the question resolved into this, Whether she was to take under the conveyance as a conditional institute, or as a substitute under the entail;—that it was impossible she could contend that she was conditional institute, without admitting that if William Frederick Mackenzie had survived Lord Seaforth, the destination to her would have been entirely evacuated, seeing that the condition on which her institution depended was purified;—that the circumstances of his predecease could not give her a more extensive right; for although the deed was not delivered, yet a personal fee was created in his favour; so that, before she could be entitled to take up the estate, she must have obtained a general service as his heir, and consequently could claim right in that character only. In support of the second defence they observed, that it was necessary to distinguish between this case, and those in which it had been held that the institute was not fettered;—that the decisions in these cases proceeded

May 13. 1828. on the circumstance of the fetters being clearly directed against another and a different class of persons, so that the institute who was not included among them was held to be unfettered;—that, however, it was perfectly possible to apply the fetters to him, and that if this were done in words clearly expressive of the intention of the entailer, he would be bound by them;—that, in the present case, the fetters were directly applied, not only to the institute, but to every other person in the deed, and particularly to the pursuer herself; so that it was impossible that she could make up titles under this deed, without being liable to all the conditions and limitations under which it was granted in her favour. They also further contended, that the words 'persons and successors,' in reference to those who should acquire right under the entail, included the pursuer, whatever character she assumed, whether as conditional institute or disponee.

To the first of these pleas it was answered, that a party can only succeed to lands as an heir or as a disponee, (these two titles being different from and opposed to each other);—that a person succeeds as disponee, when the deceased proprietor has, during his lifetime, executed a disposition to take effect at his death in favour of that party;—that an entail is a disposition subject to certain conditions in favour of a series of persons, the first of whom is the disponee or institute, and the others heirs-substitutes; but that it depends upon events, whether the person so first named, or any of the others, be in fact the disponee;—that if that person die, without obtaining any right under the disposition, the second member of the entail cannot make up titles to him as an heir or substitute, because there is nothing vested in him which can be taken up by service; and therefore the second member succeeds as disponee in virtue of the conveyance to him, and is described in law as the conditional institute or disponee. In this case, therefore, it was contended, that as there was no vested interest either in William Frederick or Francis John, (seeing they predeceased the entailer, and at a time when the deed was undelivered and subject to revocation,) she could not be served heir to them, nor could she be to her father, because the deed had the effect to divest him at the moment of his death, and therefore she could only take in virtue of that deed, or, in other words, as conditional institute or disponee; and that although a service might be useful to show that her brothers had died without issue, yet this might be equally as well accomplished by a decree of declarator to that effect. With regard to the second defence, she answered, that although the dispositive clause was made in her favour nominatim, yet neither the irritant nor resolutive clauses were directed against

her personally; that they were confined to the heirs of entail, or substitutes or successors; but that she was neither an heir nor a substitute, nor was she a successor to any one under the entail. May 13. 1822.

The Court, on the report of Lord Craigie, found, 'that the 'pursuer is an heir of entail substituted in the deed executed by 'her father, and founded on in her summons; and that she must 'make up her titles to the lands and others contained in that 'deed as an *heir of entail*, subject to the conditions, declarations, 'restrictions, limitations, clauses irritant and resolutive, contained 'in the said deed;' and therefore in so far sustained the defences, and assolzied the defenders. Thereafter, on the 24th November 1818, they found, 'That the pursuer is an heir of entail sub- 'stituted in the entail executed by her father, and founded on 'in the summons, and that she must make up her titles to the 'lands and others contained in that deed, subject to the con- 'ditions, declarations, restrictions, limitations, clauses irritant and 'resolutive, contained in that deed; and, with this variation, ad- 'hered to the interlocutor complained of.' *

The pursuer having appealed, the House of Lords found, 'That, by the terms of the deed of entail in question, the disposi- 'tion in favour of the appellant Mary Frederica Elizabeth Stewart 'Mackenzie, by which she can make title to the lands and estates 'in question is, by force of the words in such deeds constituting 'her an heir of entail substituted on failure of her brother Francis 'John Mackenzie, and the other heirs and substitutes by the 'said deed, appointed to succeed to the lands and estates prior 'to the disposition in favour of the said appellant: Therefore it 'is declared, that as her title to the said lands and estates is only 'by force of the words in such deed of entail constituting her 'expressly an heir of entail so substituted, the said appellant 'is bound by the conditions, declarations, restrictions, limitations, 'clauses irritant and resolutive, contained in the said deed of 'entail: And it is ordered, that, with this finding and declaration, 'the cause be remitted back to the Court of Session, to do therein 'as may be consistent therewith, and as shall be just.'

Lord Chancellor.—My Lords, there is another case not of any great difficulty, though I admit it to be a case of great importance—I mean the case of Mackenzie *v.* Mackenzie. That case, to state it in a few words, amounts to this: Your Lordships know that entails are strictissimi juris—I mean those with prohibiting, irritant, and resolutive clauses, and so on; and it has been repeatedly held that a disponee,—that

* See Fac. Coll. Nov. 24. 1818, where it is said that all the Judges, except Lord Bannatyne, concurred in the interlocutor.

May 13. 1822. is, the person first named in a disposition, unless he is expressly named, is not to be considered as included by construction or by implication, unless the fetters are expressly imposed upon him, though they are imposed on all the heirs of entail, and even though he might have been, as is held in some of those cases (particularly the Duntreath,) called an heir of entail; and though it is very difficult to find in the statute of entails any description of a disponee, except under the description of heir of entail, yet it has been held,—and having been held, titles must not be shaken by any departure from what has been so held,—that in that case you cannot imply as against him.

Now, my Lords, the facts of this case are these: The author of this entail names A. as the first tail, B. as the second tail, C. as the third tail; and I will say that C. was Mrs. Mackenzie, the party in this case. He has laid the fetters upon all of them nominatim. If he had died the next day, and those three persons had survived him, they would have been all subject to the fetters of the entail, because the fetters of the entail were by express words imposed upon all of them. But the fact is this, that two of them, A. and B., die before the author of the deed dies; then C. comes forward as the first taker under the entail; and it has been argued that although C., if she had remained an heir of entail,—that is, if she had remained an heir of entail postponed to A. and B.—would have been bound by the fetters, yet, in as much as she becomes a disponee, or quasi disponee, and the fetters are not laid upon her as disponee, but laid upon her in the character of heir of entail, and she is no longer an heir of entail, but becomes a disponee, she is not bound by the fetters. My Lords, I confess I cannot adopt that reasoning. I apprehend you are to look to what was the effect of the deed, and the construction of the deed at the time the deed was made; and, therefore, though it may be difficult, and I think it is difficult to support the interlocutor in the particular expressions to be found in it, yet it does appear to me that the judgment of this House will be right, if we pronounce this as our declaration, that she is bound, notwithstanding those circumstances, by the fetters of the entail, and then leave the Court of Session to apply that finding as, in the circumstances of the case, it may be meet and just they should apply it. I beg only to add, that, in forming this opinion, I adhere, I think, to the doctrine, that you are not to imply that you are not to impose fetters by implication, and that it does not appear to me, on examining the whole circumstances, that the judgment would form a contradiction to, or be inconsistent with that finding.

Appellant's Authorities.—(1.)—2. Craig. 2—29; 2. Ersk. 2. 9; 2. Ersk. 8. 75; Leslie, Feb. 17. 1699, (3597); Denholm, Jan. 1726, (6246); Lord Strathnaver, Feb. 2. 1728, (15373); Forbes, Aug. 3. 1756, (14859); Campbell, Nov. 28. 1770, (14949); 1. Bank. p. 231; Inglis, July 16. 1760, (8084); 2. Craig, 17—22, and 29—31; 3. Stair, 5. 25; 2. Ersk. 8. 73; Wellwood, Feb. 23. 1791, (15463); Mercer, June 5. 1745, (9788); Elch. No. 4. Imp. Will, and No. 8. Prov. to Heirs.—(2.)—Menzies, June 25. 1785. (15436); Menzies, Jan. 18. 18039, (Aff. July 20. 1811.)

Respondent's Authorities.—(1.)—3. Ersk. 8. 44; Stevenson, June 24. 1784, (14863); 3. Stair, 5. 25; 3. Bank. 5. 22; 3. Ersk. 8. 73; Gordon, Feb. 8. 1748, (14368); Campbell, Nov. 28. 1770, (14949.)—(2.)—Syme, Feb. 27. 1799, (75473, Aff. April 25. 1803, No. 5. Ap. Tailzie); Edmonstone, Nov. 24. 1769, (4409); Steel, May 4. 1814, (F. C.)

May 24. 1822.

A. MUNDELL,—J. CAMPBELL,—Solicitors.

(*Ap. Ca. No.* 21.)

JAMES DUKE of ROXBURGHE, Appellant.—*Gifford—Mackenzie—Riddell.*

Lieut.-Gen. WALTER KERR, Respondent.—*Clerk—Cranstoun—Thomson—Fullerton.*

No. 35.

Proof.—Circumstances in which it was held, (affirming the judgment of the Court of Session,) that the description of a person in an ancient deed as filius carnalis did not prove that he was illegitimate.

May 24. 1822.

2D DIVISION. Lord Pitmilly.

ON the death of William Duke of Roxburghe, General Kerr laid claim to the honours and estates of the family of Roxburghe, but was successfully opposed by the appellant, then Sir James Norcliffe Innes. These estates were strictly entailed, and, on failure of the appellant without issue, they descended to General Kerr. With a view to the assertion of his claim in the competition, General Kerr had obtained himself served heir-male of Robert first Earl of Roxburghe, and of Henry Lord Kerr, and, pending it, the appellant raised an action of reduction to set aside these services. After, however, memorials had been ordered by the Lord Ordinary to the Court, he applied for leave to withdraw the action, and the Court in consequence, on the 11th December 1811, pronounced this interlocutor: 'Having heard this petition, in respect the petitioner has desired to 'withdraw this action, allow him to do so, and assoilzie the defender, and decern; find the defender entitled to his expenses,' &c. Thereafter, in 1815, and subsequent to his success in the competition, the appellant, conceiving that he had obtained evidence affecting the legitimacy of General Kerr's ancestors, brought a new action for reducing his services, and the decreet of absolvitor pronounced in the former reduction; and concluding to have it declared that he, the appellant, as the last heir of entail, held the estate in fee-simple, and that the pretensions which were made by General Kerr to the character of a substitute heir of entail were not well founded. The chief ground on which this action was rested were, 1. That Mark Kerr of Dolphinstone or Littledean, from whom General Kerr derived his descent, was not the

May 24. 1822. legitimate son of Walter Kerr of Cessford; and, 2. That even supposing that Mark Kerr were legitimate, yet that John Kerr, the son of Sir John Kerr and Margaret Whytlaw, through whom also General Kerr traced his pedigree, was illegitimate. In support of the first of these allegations, the main evidence relied on by the appellant was an instrument of sasine in May 1499, by which infeftment was given by Walter Kerr of Cessford, 'Marco 'Kerr, suo filio carnali;' and he contended that the word carnalis, according to the technical phraseology of the law of Scotland, was at that time synonymous with the term naturalis; and that although it was capable of expressing legitimate connexion when used along with adjuncts to that effect, such as 'et legitimus,' &c., yet, where it was employed by itself, it was understood to mean that the birth of the party was tainted by bastardy;—that such being the case, and there being deficiency of evidence of his alleged legitimacy, he must be regarded as having been a natural son. In relation to the second ground of reduction, it was stated that Sir John Kerr of Littledean, &c. who was married to a lady of the name of Julian Home, formed in 1577 or 1578 an adulterous connexion with Dame Margaret Whytlaw, the wife of Sir Alexander Hamilton of Innerwick—that, in consequence, Sir Alexander obtained a decree of divorce against his wife, and that a similar decree was in 1589 obtained against Sir John Kerr by his lady, Mrs. Julian Home—that within 12 days after the last of these decreets, and while both Sir Alexander Hamilton and Mrs. Julian Home were alive, Sir John Kerr married Dame Margaret Whytlaw—that John Kerr was the son of this marriage, which by the common law of Scotland was unlawful, and therefore that he must be regarded as a bastard. In defence, General Kerr pleaded, 1. That the decree of absolvitor in the former action, having been pronounced in foro, formed a res judicata; 2. That the legitimacy of Mark Kerr was proved by a variety of documents and circumstances which were quite inconsistent with the idea of his being a bastard—that the instrument of sasine was not lawful evidence, but the mere assertion of a notary, the charter to which it referred not being produced, and that the term carnalis was proved by various authorities, and by its being applied to persons lawfully born, not to be expressive of the meaning attached to it by the appellant; 3. That as the marriage between Sir John Kerr and Dame Margaret Whytlaw took place prior to the stat. 1600, c. 20. it was perfectly lawful; and accordingly a decree to that effect had been pronounced by the Commissaries, and its validity had been recognised both by the Court of Session and the General Assembly, and John Kerr had been served and retoured as 'le-

'gitimus et propinquior hæres' of his father. Lord Pitmilly repelled the reasons of reduction, and assoilzied General Kerr; and to this interlocutor the Court adhered on the 16th November 1819, and 11th March 1820,* and modified the expenses to £1521 : 8 : 6. Against these interlocutors, and also against the decree of absolvitor in 1811, the appellant James Duke of Roxburghe having entered an appeal on the above grounds, the House of Lords found, that 'in this case, in which it has been 'insisted on the part of the respondent, among other matters, 'that the appellant is barred by the plea of res judicata, that it is 'not necessary to determine whether he is so barred; but assuming that he is not so barred, the several interlocutors complained 'of ought to be affirmed: It is therefore ordered and adjudged, 'that the interlocutors complained of be accordingly affirmed.' May 24. 1822.

Appellant's Authorities.—(2.)—Geddes, Feb. 25. 1796, (12641); Haddington's Collection, Vol. I. No. 636.—(3.)—1592, cap. 11; 1. Craig, 14. 14; Mack. Crim. Law, p. 98; Ferguson's Reports, 364.

Respondent's Authorities.—(2.)—2. Craig, 7. 7; 2. Mack. 294; 2. Bank. S. 42; 2. Ersk. S. 35; King, Nov. 15. 1682, (12523); Keble, Dec. 4. 1804, (14314);—(3.)—1600, c. 20; 1. Stair, p. 445; Crawford, Feb. 25. 1642, (12689.)

SPOTTISWOODE and ROBERTSON,—J. RICHARDSON,—Solicitors.

(*Ap. Ca. No. 22.*)

CHARLES FERRIER and Others, LYELL'S Trustees, Appellants.—*Gifford—Clerk—Jameson.*
JAMES HECTOR, Respondent.—*Cranstoun—Vere.*

No. 36.

May 24. 1822.

1ST DIVISION. Lord Alloway.

Trust—Mutual Contract.—A tenant having entered into an agreement with his landlord to renounce his lease at a particular period in consideration of a certain sum, and the landlord having prior to that period become bankrupt, and conveyed his estates to trustees—Held, (reversing the judgment of the Court of Session,)—1.—That the tenant had no right to insist that the trustees should accept of the renunciation, and pay the stipulated price, but that he was bound to elect either to retain his lease, or rank as an ordinary creditor under the trust for the price;—and,—2.—That there were not sufficient circumstances alleged to infer an adoption of the agreement by the trustees, so as to bind them to implement it specifically, either officially or personally.

In 1787 Robert Davidson obtained a lease of the farm of Fernieflat, part of the estate of Kinneff, for the lifetime of the tenant in possession, at the yearly rent of £276 : 5 : 6. This lease Davidson assigned to Hector, who took possession; and some years

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* Not reported.

May 24. 1822. thereafter Lyell, the proprietor of Kinneff, entered into an agreement, dated in July 1800, with Hector, by which, 'in consideration of the renunciation to be executed by the said James Hector of his lease of Fernieflat,' Lyell agreed to pay him 'the sum of '£10,000 sterling, by equal instalments, at Whitsunday 1817, 'Martinmas 1817, and Whitsunday 1818, with interest on each 'instalment from each term's payment, and penalty, agreeably to 'law.' On the other part, Hector bound and obliged himself, 'upon payment or satisfactory security being given to him for 'the aforesaid sum, to execute a valid renunciation of the present 'subsisting lease of Fernieflat,' &c. in favour of the 'said George 'Lyell, &c. whereby the said James Hector shall become bound 'to remove himself and subtenants from the said farm at Martinmas 1816.' Hector also bound himself to follow in the meanwhile a particular course of cultivation, and to give certain advantages to an incoming tenant; and by a separate letter he stated, that 'I shall, on satisfactory security, delay the half of each 'instalment for six months after each term of payment, you paying interest on the sum not paid; and on granting heritable 'security for the £10,000, or such part as may be due, I shall 'execute in your favour a renunciation of the lease, in terms of 'our agreement.'

In October thereafter, Lyell's affairs becoming embarrassed, and while he was arranging as to conveying his estates to trustees, Hector executed an inhibition against his whole heritable property, but in the following month of March it was restricted to the estates of Kinneff and Largie. In April 1811 Lyell made a trust-deed in favour of the appellants, for behoof of themselves and his other creditors, by which, after narrating the various debts due by him, (several of which were heritably secured,) he conveyed his estates to these trustees, 'for and to the use and behoof 'of my creditors before named, and of any others my just and 'lawful creditors here omitted, whom the said trustees shall 'assume into the benefit of this disposition.' The trustees were empowered to sell the lands, and apply the price in payment of the debts; but it was declared that they should have no power to prefer any one creditor to another, or to affect the legal rights acquired by them by diligence or otherwise. The trustees immediately took possession, were infeft on the 30th December 1815, managed the estates as the sole and exclusive proprietors, and Hector followed the course of cultivation prescribed by the terms of the agreement. In 1813, 1814, and 1815, the trustees repeatedly advertised the lands of Kinneff for sale, and among other advantages they stated, that 'on the principal farm (viz.

'that of Fernieflat) there is a most commodious and substantial 'steading, and offices of every description, containing thrashing 'machinery of great power; and the tenant has, at a very con- 'siderable expense, made an addition to the dwelling-house, so 'as to render it capable of accommodating a gentleman's family. 'The lease of this farm expires in the year 1816, and the tenant 'is restricted to a beneficial mode of cropping; so that a pur- 'chaser could then enter to the dwelling-house, and a tenant to 'the farm, under very favourable circumstances.' May 24. 1822.

Having been unsuccessful in selling the lands, the trustees afterwards advertised the farm to be let, stating that the term of entry was to be at Martinmas 1816. In this they were also unsuccessful; and when that period arrived, Hector, under form of protest, declared that he was ready to renounce the lease, and required payment or security from the trustees in terms of the agreement. This being rejected, Hector brought an action against Lyell and them, both personally and officially, concluding that they should, in one or other of these characters, be ordained 'to receive and accept a 'renunciation of the lease of the said lands from the pursuer, and 'thereupon to deliver to him a bond, with sufficient caution or 'other satisfactory security, for the payment of the foresaid sum 'of £10,000 sterling at the terms specified in the said agreement, 'with interest;'—'or otherwise, in case the said defenders shall 'fail to accept the said renunciation, and accept the premises as 'aforesaid,' then they ought to be ordained 'to make payment 'to the pursuer of the sum of £15,000 sterling,' as the damages sustained by such failure.

In support of the conclusions against the trustees, Hector contended, that, by their conduct, they had homologated and adopted the contract which had been made with Lyell; and that they were equally as much bound as he was to implement it. To this it was answered, 1. That they had not acted in such a manner as to have adopted the contract, either as trustees or personally;—that, in order to make this out, it was necessary, not merely to infer such an adoption by facts and circumstances, but to show a clear and distinct consent to do so;—that the advertisements and other acts were done in the performance of their duty to the other creditors; and that they were entitled to advertise the farm, in order to ascertain its value. 2. That the contract merely gave Hector a personal claim against Lyell for the £10,000, and that he was not entitled to demand from the trust-estate full payment of that sum, in preference to the other creditors; and that, by the terms of the trust, they were prohibited from giving any creditor a preference. Thereafter the trustees raised an action before the

May 24. 1822. Sheriff of Kincardineshire, concluding against Hector for payment of the rents subsequent to May 1816; which he resisted on a plea of retention. This defence being repelled by the Sheriff, in respect that the sums claimed by him were not yet payable, he brought an advocation; which was conjoined with the action against the trustees. The Lord Ordinary, on advising a condescendence and answers in the latter action, and after holding that the contract was binding on Lyell, pronounced an interlocutor finding, — '1. That as this contract was found effectual against 'Mr. Lyell by the interlocutor of 11th December 1816, so it 'must also be effectual against Mr. Lyell's trustees, as his trust-'deed was executed long after that period, and his trustees can-'not be in a better situation than himself, but that these defenders 'can only be liable qua trustees, and are not personally liable for 'implement of the contract;—2. That if the trustees, as acting 'for Mr. Lyell and the creditors, take the benefit of that contract 'by selling the lands, as free of the pursuer's lease, or in any 'other manner taking the benefit thereof, they must implement 'the agreement to the pursuer, and pay the price of the lease;— '3. That the circumstances condescended on by the pursuer are 'not sufficient to bind these defenders, and the creditors for whom 'they act, to implement the agreement as to the lease, or to pay 'the price thereof, reserving to the pursuer his right of retaining 'the lease until the conditions of the agreement shall be imple-'mented, or of securing the price of it by the inhibition he has 'used, or by any other mode he shall consider as effectual, and 'to all persons interested their defences, as accords; and therefore 'assoilzied the trustees from all personal conclusions against them.'

In relation to the advocation of the action for rents, the Lord Ordinary found, 'That as the landlord stands indebted to the te-'nant, by a liquid ground of debt, to a much greater amount 'than the rents in question, he is entitled, in a question with Mr. 'Lyell's trustees, to retain his rents in extinction of that debt 'which was contracted prior to the trust; and in respect that it 'is in the power of any of the heritable creditors who held herit-'able rights prior to the obligation granted by Lyell, and the 'inhibition following thereon, to take possession of the estate by 'mails and duties, and thereby to secure not only the interest, 'but the principal sums due to them, and that no appearance has 'been made in this case but by the trustees acting under a vo-'luntary trust executed by Lyell himself long subsequent to the 'obligation granted by Lyell to Hector, and inhibition following 'thereon; and therefore sustained the claim of retention made by 'Hector.'

Hector having reclaimed against the former of these interlocutors, and the trustees and an heritable creditor against the latter, the Court, on the 28th June 1819,* altered, and found 'it sufficiently established that the defenders, Mr. Lyell's trustees, did, by their acts and proceedings, assume the agreement 'libelled on as beneficial to the trust-estate, and the objects of 'the trust-deed in their favour; and that the said defenders qua 'trustees, and the estate and effects under their management, are 'therefore liable and answerable for specific implement of the said 'agreement;' and decerned accordingly, with expenses; but refused the petition for the trustees and the heritable creditors, 'in 'respect the lawful rights and claims of all the heritable creditors 'are expressly reserved in the interlocutor reclaimed against, and 'are open to be proponed in due and competent form of law.' May 24. 1822.

Thereafter the estates of Lyell were sequestrated in terms of the bankrupt act; and Ferrier having been appointed trustee, he and the other voluntary trustees entered an appeal to the House of Lords, who found, 'That it was not sufficiently established that 'the appellants, trustees of the said George Lyell, did, by their 'acts and proceedings, adopt and assume the agreement libelled 'as beneficial to the trust-estate, and the objects of the trust-'deed in their favour; and that the said appellants qua trustees, 'and the estate and effects under their management, are not liable 'and answerable for specific implement of the said agreement: 'And it is ordered and adjudged, that the interlocutors complained of, so far as the same are inconsistent with this finding, and 'especially so far as the same decern against the said appellants, 'qua trustees, for specific implement in terms of the libel, accordingly, and so far as the said interlocutors find them liable 'to the pursuers in the expenses of process, and all directions 'consequent thereupon, be reversed: And it is declared and adjudged, that the respondent could only demand implement of 'the said agreement against the said appellants, as trustees as 'aforesaid, according to the terms of the said trust-deed, without 'preference to any other creditor of the said George Lyell entitled to the benefit of such deed, and according to the terms of 'the said agreement: And it is further declared and adjudged, 'that the respondent is bound to elect either to perform the said 'agreement specifically on his part, and seek for implement thereof on the part of the said George Lyell as a creditor of the said 'George Lyell, according to the terms of the trust-deed, or to 'retain the benefit of his lease, and demand damages for non-

* Not reported.

July 5. 1822.

'performance on the part of the said George Lyell, in such manner as he shall be advised: And it is further ordered, that the cause be remitted back to the Court of Session, to review generally the interlocutors complained of, so far as the same are not hereby reversed or altered, and to do therein as shall be just, having special regard to this judgment.'

Appellant's Authorities.—(1.)—4. Dow, 341; 1. Espinasse, 283; 7. East. 335; 3. Campbell, 340.

J. CAMPBELL,—C. BERRY,—Solicitors.

(*Ap. Ca. No. 23.*)

No. 37.

THOMAS ARROL and Others, (JAMES SPADEN's Trustees,) Appellants.—*Cranstoun—Fullerton.*

WALTER SPADEN, Respondent.—*Cockburn—More.*

Recompense—Legacy.—Circumstances in which it was held, (reversing the judgment of the Court of Session,)—1.—That there was no sufficient evidence of a claim made against the trustees of a defunct for recompense on account of labour, over and above wages paid during the life of the deceased;—and,—2.—Affirming the judgment, that a legacy bequeathed by the defunct to the party so claiming recompense could not be imputed in extinction pro tanto of such claim, even if it had been duly established.

July 5. 1822.

2D DIVISION. Lord Pitmilly.

THE late James Spaden, builder in Edinburgh, was in the practice, from 1801, of employing Walter Spaden as his foreman or manager. In September 1808 James died, leaving a trust-deed in favour of Arrol, his mother, and others, by which he conveyed to them his whole effects, real and personal, for the purpose, 'Primo, To make payment, out of the first and readiest of 'my said means and estate, of all my just and lawful debts and 'funeral charges, and expense of management under the trust. 'Secundo, My said trustees,' &c. 'shall proceed as soon as possible 'to convert my personal property into cash, and apply the same 'to payment of my debts as aforesaid; and if the proceeds shall 'prove insufficient for that purpose, to sell and dispose of my 'heritable property, &c. Tertio, I hereby declare the said Mrs. 'Elizabeth Tulloch otherwise Spaden, my mother, to be my 'residuary disponee and legatary to my whole means and estate, 'heritable and moveable, after payment of my debts as aforesaid; 'but under the burden always of the sum of £300 sterling to 'be paid to Walter Spaden, builder in Edinburgh, at the first 'term of Whitsunday or Martinmas after her the said Mrs. 'Elizabeth Tulloch's decease.'

Soon after the death of James Spaden, Walter claimed from

his trustees £39 : 13 : 8, being a debt of lent money and wages to himself and apprentices. This was paid; but subsequently he made an additional claim of upwards of £600, which was composed of sums which he alleged he had borrowed on behalf of and paid to James Spaden, and for which he had become responsible; and also of a certain share of profits, to which he stated he had right as partner of James Spaden in building speculations. This claim was submitted to arbiters; and, after some discussion, Walter gave up his demand for a share of the profits, but insisted that he was entitled to remuneration for extraordinary services which he had performed, over and above the wages which he had received as foreman of James Spaden. The arbiters expressed an opinion that Walter was entitled to an additional sum beyond what he had received, and they remitted to Mr. Robert Burn, architect, to state what the amount of that recompense should be. That gentleman reported that, after certain deductions, Walter was entitled to £382 : 9 : 9. The submission, however, having expired before any decree was pronounced, Walter brought an action concluding for this sum, and repayment of the borrowed money. This claim was disputed by the trustees, who alleged that there was not only no evidence in support of it, but that it was contradicted by the circumstance of Walter having been regularly paid his wages as a foreman,—by the terms in which the entries in the books and accounts of the parties were expressed,—by having originally limited his claim to £39 : 13 : 8, and having been paid that sum. The Lord Ordinary found that he was 'entitled to claim an additional allowance for superintending the business of the late James Spaden as a builder, 'from the year 1801 to the year 1808, beyond what he received 'from time to time from the said James Spaden while the building was going forward;' fixed the amount at that reported by Mr. Burn, and decerned accordingly. July 5. 1822.

In the mean while the legacy of £800 had become payable in consequence of the death of Mrs. Spaden, and Walter thereupon brought a new action for payment of it. Against the above judgment the trustees represented, and contended, 1. That even if there were such a debt as that demanded, the legacy must be held to have been intended to extinguish it, or at least as a sufficient recompense for any services performed; and, 2. That both the debt and the legacy could not be found due.

The Lord Ordinary, after adhering to that part of his interlocutor finding that Walter was entitled to a recompense for the amount reported by Mr. Burn, found, 'That the sum of £300 'sterling which Mr. James Spaden bound his executors to pay to

July 5. 1822.

'the respondent, must be imputed in extinction pro tanto of the 'debt, in respect the respondent had a legal claim for a remuner- 'ation for his services against Mr. James Spaden, which consti- 'tuted Mr. Spaden his debtor; and this affords a legal presump- 'tion that a donation over and above was not intended, and the 'precise amount of the debt was not ascertained by any express 'bargain; so that Mr. James Spaden, although he appears to 'have felt the obligation, could not exactly know the extent or 'amount of it, and it is not said in the settlement that the £300 'was meant as a pure gift or legacy.'

Walter having represented against this interlocutor, the Lord Ordinary found, 'That the clause in the settlement of Mr. James 'Spaden, founded on by the representer, affords a presumption 'that the deceased considered the representer to be entitled to a 'remuneration for his services, over and above the wages which 'had been paid to him, and also furnishes evidence of the amount 'at which the deceased estimated the representer's claim to such 'remuneration;—that, therefore, the clause in the settlement may 'be considered as evidence in the representer's favour in the 'action in which he insists for payment of a sum of money as a 'remuneration for his services; but that it cannot be legally 'inferred from the sum in the settlement, that the deceased James 'Spaden intended to give a donation or legacy of £300 to the 'representer, in addition to the payment of a debt,—the represent- 'er's claim to any payment on this score, as well as the amount 'of the claim, having been only ascertained by legal process since 'the death of Mr. James Spaden;' and therefore adhered to his interlocutor, finding that it must be deducted.

Both parties having reclaimed, the Court adhered as to the amount of the recompense due to Walter, but found that he 'is 'entitled to payment of the legacy bequeathed him, besides and 'over and above the payment of the debt due to him,' but that no expenses were due on this point of the case; and to this interlocutor they afterwards adhered on the 14th of January 1819.*

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* See Fac. Coll. where it is said, 'Three of the Judges were of opinion that the 'maxim, debitor non presumitur donare, did not apply in this case, chiefly on the ground 'that the deceased owed the petitioner a debt at his death, as had been now ascer- 'tained by the Court;—that a person could not intend to pay a debt by a legacy, payment 'of which was postponed for an indefinite distant period; and that the deceased spe- 'cially directed that all his debts should be paid before this legacy.

'The remaining two Judges were of an opposite opinion, upon the ground that the 'petitioner's claim, although it had been subsequently ascertained by the Court to be a 'legal debt, was more like a discretionary claim upon the testator's generosity, than 'a precise claim which could be enforced in a Court of Law;—that it had not been 'brought forward as a debt during the testator's life; and that, therefore, the legacy

The trustees then appealed against these judgments:—1. Because there was no sufficient evidence of the claim for recompense, and of the cash advances made by Walter; and, 2. Because, at all events, the legal maxim, debitor non præsumitur donare, was peculiarly applicable; and therefore the legacy of £300 must either be held to have been intended to discharge any such claim, or at least to form a deduction from it. To this it was answered, 1. That there was sufficient evidence of the debt which was claimed; and, 2. That the legal maxim founded on could not apply to such a case as the present, because, independent of every other circumstance, the debt and the legacy were not of equal amount;—that the latter was not to be payable till after the death of Mrs. Spaden, a period which was perfectly indefinite;—that it was payable only after all debts were discharged; and that it was evidently intended as a mere gratuity, not as a satisfaction of debt, seeing that it was bequeathed to himself personally, and not to his executors, so that, by his predecease, it might have lapsed. July 5. 1822.

The House of Lords found, 'That in the action brought by the 'respondent against the deceased Elizabeth Tulloch, otherwise 'Spaden, for payment of any debt claimed by him as then re- 'maining due to him from the said James Spaden, there is no 'sufficient evidence that the respondent is entitled to claim any 'additional allowance for superintending the business of the late 'James Spaden as a builder, or for his apprentices, or for cash 'advanced by him, beyond what he had actually received, as 'claimed by the respondent in the said action: But the Lords 'declare, that if any such debt had remained due to the respond- 'ent, there is no sufficient ground for finding that the sum of '£300 sterling, which the said James Spaden bound his executors 'to pay to the respondent, ought to be imputed in extinction 'pro tanto of any debt due from the said James Spaden, at the 'time of his death, to the respondent: It is therefore ordered 'and adjudged, that the interlocutors complained of, so far as the 'same find that the respondent is entitled to any such allowances as 'aforesaid, and as the same repel the defences pleaded by the de- 'fenders in the first action brought by the respondent, and decern 'in terms of the libel, be reversed: And the Lords find that the 'respondent is not entitled to expenses in the said action, and al-

'must be held to have been intended to discharge that claim, and therefore ought not 'to be paid in addition to legal satisfaction of the claim.' And thereafter, 'Upon ad- 'vising a reclaiming petition, four of the Judges approved of the interlocutor of the 'Court upon the ground which had formerly weighed with the majority, and the re- 'maining Judges disapproved of it upon the grounds which had influenced the mino- 'rity.'

July 5. 1822. 'low the defences in the said action, except in so far as the same 'are founded on the assertion that the said legacy or sum of £300 'ought to be imputed in extinction pro tanto of any debt due 'from the said James Spaden, at the time of his death, to the 'respondent, and assolzie the appellants as defenders in the said 'action, but find no expenses due for litigation between the 'parties on this point: And in respect of the second action brought 'by the appellants for payment of the said legacy or sum of '£300, it is further ordered and adjudged, that the interlocutors 'complained of, so far as the same find that the respondent was 'entitled to payment of the said legacy or sum of £300, besides 'and over and above any debt due to him at the time of the 'death of the said James Spaden, and as find that no expenses 'were due for litigation between the parties on this point, be af-'firmed.'

Appellant's Authorities.—(2.)—4. Stair, 45. 17; 3. Ersk. 3. 93; Innes, Dec. 1783, (11464); Davidson, June 25. 1706, (6966); Fleming, Nov. 19. 1661, (8260); Houston, Nov. 16. 1708, (11465); Greig, Feb. 19. 1768, (11454).

Respondent's Authorities.—(2.)—4. Stair, 45. 17; 1. Stair, 6. 2; 2. Stair, 42. 21; 1. Bank. 9. 26; 3. Ersk. 3. 93; 1. Masc. de Prob. 199; 2. Mineeh de Presum. 352. 362; 10. Mant. de Conj.; 2. Toller on Ex. 336; 2. Fonbl. on Eq. 422; 1. P. Williams, 408; 3. Atk. 68; 2. Atk. 300; 3. Atk. 97; 3. Ves. jun. 466; Cruickshank, June 16. 1665, (11489); Dickson, Dec. 5. 1671, (11490.)

J. RICHARDSON,—J. CAMPBELL,—Solicitors.

(*Ap. Ca. No.* 25.)

JOHN INNES, W. S., Appellant.—*Clerk—Cranstoun—Skene.* No. 38.
MARY BARONESS MORDAUNT, and DUKE of GORDON, Respondents.—*Gifford—Warren—Lumsden—Robertson.*

Tailzie—Personal Objection—Process—Appeal.—Held, (affirming the judgment of the Court of Session,)

1. That a prohibition in an entail 'to dispone, sell, wadset, or away put,' is sufficient to prevent an heir of entail from granting a lease of the whole estate for 76 years and a lifetime.
2. That it is competent to reduce an act of contravention after the death of the contravener.
3. That although it is competent to an heir-substitute to bring a declarator of contravention against a contravening heir of entail in possession, yet his failure to do so, and the circumstance of not objecting to improvements made by a tenant possessing under a lease granted contrary to the entail, do not bar the heir-substitute from reducing the lease.
4. That although a remote substitute transact with such tenant, on the assumption that his lease is valid, and a nearer substitute obtain for a valuable consideration the cancellation of the transaction, this does not bar the substitute so cancelling from objecting to the lease.
5. That it is not competent to sist a respondent in the House of Lords in place of one who has died, and against the former of whom a personal objection not pleaded in the Court of Session is alleged to exist; and,
6. That, in order to obtain such respondent sisted in the Court of Session, the process must be remitted back from the House of Lords.

July 5. 1822.
2D DIVISION.
Lord Pitmilly.

SIR ALEXANDER FRASER, physician in ordinary to King Charles II., was twice married,—first to Mrs. Elizabeth Doghtie, by whom he had a son, Charles;—and, secondly, to Dame Mary Carey, by whom he had a son, Piedro or Peter, and a daughter, Carey. Having reacquired by purchase the estate of Durris, (which originally belonged to his family,) Sir Alexander executed a deed of entail on 22d November 1669, proceeding on the narrative, that 'for as meikle as, out of the zeal and desyre I have had 'to revive and restore the antient family of Durris, which has stood 'in a prosperous and flourishing condition for some hundreds of 'years in the persons of my predecessors of the surname of Fraser, 'whereof I am lineallie descended ane lawful son of the family, 'I have purchased the saids lands with the meins wherewith the 'Lord has been pleased to bliss me, and which are the product 'of my own vertew. Out of the same zeal, and for the standing 'and subsistence of the said house and family in the surname of 'Fraser, I have resolved upon establishing of the right of succession and tailzie underwritten, as ane proper mein to make the 'samen sua to subsist in law: And withal considering that the 'most part of the sums wherewith the said lands and estate are 'purchased have come in by my marriage with Dame Mary 'Carey, my present spouse, at least conquest during the marriage 'standing betwixt us; therefore, and for the love and favour I

July 5. 1822. ‘ have and bear towards my children under named, and for cer-
‘ tain other onerous causes, good respects, and considerations
‘ moving me, wit ye me to have sold, anailzied, and disponed, like-
‘ as I by the tenor hereof sell, anailzie, and dispone from me, my
‘ heirs, and all others my successors, to and in favour of Piedro
‘ alias Peter Fraser, my eldest lawful son procreate betwixt me
‘ and the said Dame Mary Carey, my present spouse, and the
‘ heirs-male lawfully to be procreate of his body; whilks failing,
‘ to the heirs-male lawfully to be procreate betwixt me and the
‘ said Dame Mary Carey, and the heirs-male of their bodies;
‘ whilks failing, to Charles Fraser, my second son procreate
‘ betwixt me and the deceast Mrs. Elizabeth Doghtie, my first
‘ spouse, and the heirs-male of his body allenarly; whilks fail-
‘ ing, to the eldest daughter or heir-female, without division,
‘ procreate or to be procreate betwixt me and the said Dame
‘ Mary Carey,’ &c. The deed contained the usual prohibitive, irritant, and resolutive clauses; and among other prohibitions it was declared, ‘ that it shall be noways lawful to the said
‘ Piedro alias Peter Fraser, my son, nor his heirs of tailzie and
‘ provision above written, mentioned, and contained in the said
‘ tailzie and substitution, in order as is above prescribed, nor their
‘ foresaids, to alter, infringe, nor innovate this present tailzie, nor
‘ to dispone, wadset, sell, nor away put the saids lands, baronies,
‘ and others foresaid, nor to contract debt thereupon exceeding
‘ the sum of £20,000 merks Scots money, nor do no other fact
‘ or deed, civil nor criminal, whereby the saids lands and estate,
‘ or any part thereof, may be any ways apprized, adjudged,
‘ evicted, or forfaulted from them in prejudice of the next person
‘ succeeding in the foresaid tailzie, be virtue of the foresaid sub-
‘ stitution, nor their foresaids, in any sort; and if they or any of
‘ them shall failzie therein, and contravene the foresaid provisions,
‘ or either of them, then and in these cases all such deeds and
‘ debts sua to be done and contracted by them shall not only be
‘ void and null ipso facto, be way of exception or reply, without
‘ any necessity of declarator to follow thereupon, but also the
‘ committer of the said deed or deeds, and contractor of the saids
‘ debts, as said is, shall ipso facto amit and tyne the benefit of
‘ the foresaid tailzie and right of succession above written, and the
‘ samen shall pertain and belong to the next substitute person or
‘ heir of tailzie above specified, quha shall have right to succeed
‘ thereto be virtue of the foresaid tailzie, and be served and re-
‘ toured heir of provision and tailzie to us therein, without any
‘ necessity of being served and retoured heir to the said contra-
‘ veners, contractors of the saids debts, and committers of the saids
‘ deeds or crimes, sicklike and in the same manner as if the said

'tailzie had never been conceived in their favours, and in favours 'of which substitute person and heir of tailzie above written they 'shall be holden to renounce their pretended interests, and denude 'themselves and their foresaids omni habili modo.' As the lands held of the Crown, a charter was obtained under the sign-manual of Charles II., on which infeftment was taken in 1675, and both in the charter and in the sasine the prohibitory clause was thus expressed: 'Et similiter quod minime licebit dict. Domino Pedro 'Fraser, nec ejus hæredibus talliæ et provisionis supra script: 'in dict. tallia et substitutione content. modo et in ordine ut inibi 'describitur, nec eorum prædict. dict., talliam mutare, infringere, 'seu innovare, neque dict. terras, baronias, aliaq. prædict. dispo- 'nere, seu impignorare, vendere, dilapidare, neque debita desuper 'contrahere summam viginti millium marcarum monetæ prædict. 'exceden.' &c. July 5. 1822.

On the death of Sir Alexander, his eldest son Peter succeeded to the estate, which he held till 1730, when he died without issue. Charles Fraser, the other son, had also died without issue. In the mean while his daughter Carey had married the Earl of Peterborough and Monmouth; and she having died, leaving a grandson, Charles Lord Mordaunt, (who afterwards became Earl of Peterborough and Monmouth,) he made up titles to the estate by serving heir in special of tailzie and provision to Sir Peter. Earl Charles was twice married. By his first marriage he had two daughters, Lady Frances Mordaunt or Bulkely, and Lady Mary, afterwards Baroness Mordaunt, (one of the respondents); and by his second marriage he had an only son, Charles-Henry.

On the death of Earl Charles, he was succeeded by his son Charles-Henry as Earl of Peterborough, who in 1780 made up titles to the estate of Durris under the entail, in virtue of which he was infeft. After attempting to sell it to the late Francis Russel, Esq. Advocate, (but which it was found in a suspension he had no power to do,) he entered into an arrangement with that gentleman, in the form of a lease, on the 28th of August 1784, by which he let to him the whole lands and estate of Durris, comprising an entire parish, for the period of four 19 years, or 76 years, and for the life of the tenant to be in possession at the end of that time, together with the fishings, woods, mines and minerals, and game,—giving him right to cut down the woods on condition of planting one acre of forest trees for every three acres of firwood cut down, binding himself to present to the parish church any qualified person recommended by Mr. Russel, and conveying to him the whole furniture in the mansion-house, with the mansion-house itself, and power to build a new one, subject, however, to the right of the heirs of entail to enter to possession of the house

July 5. 1822. on certain conditions; and he agreed that, in the event of an appeal which he had entered against the judgment in the suspension being successful, he should sell the estate to him at a certain price.* On the other hand, Mr. Russel bound himself to pay £1000 per annum of rent for the first two 19 years,—£1100 for each of the third 19 years,—£1200 for each of the fourth 19 years,—and £1300 yearly for the lifetime of the tenant in possession at the expiration of the last of these periods. Prior to entering into this lease, reports had been judicially obtained from persons of skill, from which it appeared that the farm-houses were so ruinous, that they were not worth more than £100;—that the plantations and enclosures were greatly destroyed, and of very bad quality;—that the mansion-house was in a dilapidated condition;—and that the lands themselves were almost in a state of nature, so that the annual produce did not exceed £960. By a separate agreement in the shape of a lease, the rent during the Earl's life was restricted to £300 per annum, in consideration of which, and of the assignation of the furniture, the arrears of rent, &c., Mr. Russel bound himself to pay £15,107. 14s.

The right to this lease and agreement was, in October 1794 and May 1795, assigned absolutely by Mr. Russel to the appellant Mr. Innes, who immediately proceeded to make large and extensive improvements on the estate, in accomplishing which he alleged he had expended, between the period of his entry and the year 1814, upwards of £80,000. In particular, he alleged that he had erected 50 farm-steadings, 50,000 ells of stone dikes, a mansion-house and offices, and a bulwark on the river Dee to defend 200 acres of land;—that he had made 31 miles of road, planted 900 acres of wood, and trenched and ploughed 300 acres of ground out of heather, and brought them into a regular rotation of cropping. In virtue of the lease and assignation, he continued in the undisturbed possession till 1814, when the Earl of Peterborough died; and Lady Bulkely having predeceased him in 1798, he was succeeded by the respondent Mary Baroness Mordaunt, who obtained herself served heir of tailzie and provision to the Earl, and was thereupon infeft.

In the mean while, and in the year 1797, an agreement had been entered into between Mr. Innes and the Marquis of Huntly, (who was entitled to succeed to the estate on the death of Lady Bulkely, of the Baroness Mordaunt, and of the Duke of Gordon,) which proceeded on the narrative, that 'whereas the said Marquis 'is one of the heirs of entail of the estate of Durris in the county 'of Kincardine, and will be entitled to succeed thereto in case of the

* The appeal was subsequently withdrawn.

'failure of the Earl of Peterborough, who now enjoys the same, July 5. 1822.
'and of the other heirs of the body of the late Earl of Peter-
'borough, &c.; and whereas the said John Innes is in possession
'of the said estate, under a lease for a long term of years granted
'by the said now Earl of Peterborough, subject to payment, &c.;
'and whereas the said Marquis made offer to the said John Innes
'to give up and convey his eventual interest in the said estate,
'and rents thereof, to the said John Innes;'—therefore, in consideration of the payment of certain sums of money, his Lordship assigned to Mr. Innes his interest in the estate, and the whole claims which he might have under the lease in the event of his succession. In 1805, his father, the Duke of Gordon, after certain communings between his agents and those of Mr. Innes, repaid to that gentleman the money which he had advanced to the Marquis, with interest thereon, in consideration of which Mr. Innes discharged the obligation granted by the Marquis, and delivered up the deeds whereby it was constituted, in order to be cancelled.

Immediately on her succession to the estate, the Baroness of Mordaunt (who resided in England) raised an action of reduction of the lease granted to Mr. Russel, and assigned to Mr. Innes, and of removing, on the ground,—1. 'That the said contract or lease,
'and relative articles of agreement, were granted and entered into
'by the deceased Charles Henry Earl of Peterborough and Mon-
'mouth, in contravention of the provisions in the entail after
'mentioned, under which he held and possessed the lands and
'estate of Durris, and it was therefore ultra vires of the Earl to
'grant the same;'—and, 2. That 'the foresaid contract or lease
'contains various other clauses and conditions altogether incom-
'patible with the rights and powers of an heir of tailzie, and
'which formed no proper part of, and are not to be found in an
'ordinary tack.' She then specified the various clauses in the lease, to show that it was not of that character, and that it was contrary to the powers of an heir of tailzie under the entail of Durris. Against this action Mr. Innes stated in defence,—

1. That the Baroness Mordaunt was barred personali exceptione from insisting in the action, because he offered to prove by her oath, that at the time when he acquired his right to the lease in 1795, she was fully in the knowledge of the whole of its terms and conditions; and that although she was possessed of that knowledge, she had allowed him for upwards of twenty years to make the extensive improvements which he had executed upon the estate without the slightest interruption, and that she had done so, although it was competent to her as a substitute to have raised a declarator of irritancy against the late Earl.

2. That as she had served herself heir to the late Earl, (who,

July 5. 1822. she alleged, had been guilty of a contravention in granting the lease,) and had not passed him over as she ought to have done in terms of the statute 1685, she had identified herself with him, and therefore as she represented him, she was no more entitled to have the lease set aside, than he would have been, if he had been alive.

3. That the action was incompetent, because it had for its object to set aside an act of contravention, after the death of the alleged contravener; but that it was established law, that no declarator of irritancy could be raised after the death of the contravener; and that if effect were given to the present action, it would produce the very same consequences as if a decree of declarator of contravention were pronounced, seeing that it would give rise to a claim against the executors of the late Earl to the extent of £80,000, besides the damages arising from the loss of the lease.

4. That although it had been decided that a prohibition to *alienate* was sufficient to prevent the execution of a lease of more than ordinary duration, yet there was no such prohibition in this case; that the prohibition was merely not to dispone, wadset, sell, nor away put; but that it had been fixed by the Court of Session, that a prohibition to dispone was not equivalent to one against alienation; and that the only remaining prohibition (which was that against *away putting*) was not effectual to prevent an heir of entail from granting a lease of any duration whatever.

5. That the investitures were not in conformity to the prohibition in the deed of entail, because, in the original charter and infeftment, and in all the subsequent titles, the prohibition was, that 'quod minime licebit dict. Domino Pedro Fraser, &c., dis-'ponere, seu impignorare, vendere, *dilapidare*;' but that the word 'dilapidare' was different from, and did not convey the same meaning as the word 'away put,' and therefore that the prohibitions in the entail could not affect third parties.

To these pleas it was answered,—1. That the reference to the oath of Lady Mordaunt was not relevant, because, although it might have been competent to her to have brought a declarator of irritancy during the life of the late Earl, yet she was not bound to do so; and neither was she bound to object to any acts done by him, even although she had been aware of them, which she stated that she had not been, and that she had no opportunity of seeing the alleged improvements made by Mr. Innes, as she had all along resided in England.

2. That as the late Earl had been infeft in the lands, it was necessary to serve to him, seeing that he was the person who had died vest in the fee; but as she had served as an heir of entail,

and so held the lands in the character of a singular successor, she did not represent him. July 5. 1822.

3. That although an action of declarator of irritancy was not competent after the death of the contravener, yet it was perfectly competent to reduce and set aside any act done contrary to the terms of the entail, and which was injurious to the succeeding heir.

4. That the prohibition against disponing was of itself sufficient to prevent a lease of the nature of that in question (which was truly a lease of the propriestorship) from being granted; but that the term 'away put' was of the same strength as a prohibition to alienate, and it was admitted that such a prohibition was sufficient to set aside the lease.

5. That there was no discrepancy between the prohibitory clause in the deed of entail and the investitures; that the conveyancer had made a bona fide translation of each of the terms, and had not omitted any of the prohibitions, and that the word 'dilapi-'dare' was quite sufficient to express the English term 'away put.'

The Lord Ordinary having reported the case on informations, and a defence having been stated at the Bar, that even although, the lease should be held contrary to the prohibition in the entail, yet that it might be sustained for a shorter period, the Court found 'that the deeds of lease brought under challenge are in 'violation of the deeds of entail of Durris founded on, and there-'fore reducible; but before further answer as to the plea now 'stated from the Bar, that the leases, though they cannot be sus-'tained in toto, may be sustained for a shorter period of duration,' appointed parties to prepare memorials upon that question, reserving any claims for meliorations for subsequent discussion.

Against this judgment finding the lease reducible, Mr. Innes presented a petition, and on the cause coming to be advised with answers, having stated the defence as to the discrepancy between the entail and the investitures, the Court allowed him to put in an additional petition, and thereafter ordered memorials 'as to 'the discrepancy between the deed of entail and the import of 'the word dispone, as relative to this case.' On advising these pleadings, their Lordships, on 9th March 1819, adhered to the interlocutor finding the lease reducible, and at the same time found that it could not be sustained for any period of duration, and therefore decerned in terms of the rescissory conclusions of the libel, and also in the removing; but remitted to the Lord Ordinary to hear parties on the question of meliorations.*

* See Fac. Coll. 9th March 1819, No. 218.

July 5. 1822. *The Judges* were unanimously of opinion that none of the preliminary defences were well founded, and that the word 'dilapidare' was sufficient to express the prohibition against away putting; but Lords Robertson and Bannatyne held that that prohibition was not sufficient to strike at a lease of the nature of that in question. On the other hand, Lords Justice-Clerk, Glenlee, and Craigie were of opinion that a prohibition to away put was equivalent to one against alienation, and that a prohibition against alienation was sufficient to prevent such a lease as this being granted. Lords Justice-Clerk and Craigie were also of opinion that the prohibition to dispone was alone sufficient.

Against the judgment finding the lease reducible, (which was final in the Court of Session,) Mr. Innes entered an appeal, and at the same time presented a petition against the judgment finding that the lease could not be sustained for any period of duration, and which was superseded till the issue of the appeal.

A few months thereafter Lady Mordaunt died, and the Duke of Gordon, as the next substitute, succeeded to the estate, and was duly served and infeft accordingly. He then applied to the House of Lords to be allowed to sist himself as respondent in place of Lady Mordaunt; but it being objected by Mr. Innes that he had a personal objection to state to the Duke, which had not been discussed in the Court of Session, the House of Lords, on the 2d of May 1820, ordered 'that the prayer of the petition of the Duke 'of Gordon be not complied with.' His Grace then presented a petition to the Court of Session, praying to sist him as respondent; but the Court, on the 17th of June 1820, 'in respect that 'the process has been carried to the House of Lords by appeal, 'and thereby removed from this Court, found it incompetent to 'entertain this petition,' and therefore refused the prayer of it. The Duke having again applied to the House of Lords, their Lordships, on the 22d of July of the same year, ordered 'that 'the said cause be remitted back to the Court of Session in Scot-'land, without prejudice to the appeal, with liberty to the Duke 'of Gordon to proceed therein as he may be advised, and to ap-'ply to this House as soon as the Court of Session shall have made 'any order in this matter.'

The Duke thereupon presented a petition to the Court of Session, praying to have the personal objection disposed of; and this having been appointed to be answered, Mr. Innes stated, that in addition to the circumstances which he had pleaded as against the Baroness Mordaunt, and which were equally applicable to the

Duke, his Grace was barred from objecting to the lease,—Because, as the transaction with the Marquis of Huntly recognised the validity of the lease, and as the Duke had subsequently entered into an arrangement whereby that transaction was given up for a valuable consideration, he was not only in the full knowledge of the existence of the lease, but had so acted as to impress Mr. Innes with the belief that the lease was unobjectionable, and had led him to lay out large sums of money on the estate. To this the same answer was made as to the relevancy, as had been stated by Lady Mordaunt; and further, That so far from recognising the validity of the lease, the Duke had obtained a cancellation and discharge of the obligation by the Marquis of Huntly to give effect to it. The Court, on the 17th of November 1821, repelled 'the per-'sonal objections stated to the petitioner's right to appear as pur-'suer in this action instead of the deceased Mary Baroness Mor-'daunt, and sisted him as pursuer accordingly.' * July 5. 1822.

Lord Robertson observed, that it was unnecessary to inquire whether the transaction with the Marquis of Huntly could afford a personal objection against him, as that question was not before the Court; that the only questions which were before them, were, whether the Duke was barred, first, by acquiescence; and, secondly, by homologation. With regard to the first of these points, he did not think there was any relevancy in the allegations of Mr. Innes; for even although the Duke had been aware of the existence of the lease, and of the extensive improvements which were made, yet, as he was merely a remote substitute, and had only a contingent interest, he was not bound to bring an action for having it set aside. His right to bring such an action was res meræ facultatis, which he was not obliged to exercise. The cases of Ayton and Melville were not applicable, because the point which was there decided was, that if a party who has an immediate and existing interest lie by, seeing large sums laid out on the property, and do not bring his challenge, he will be held to have acquiesced. But the Duke of Gordon had no such interest. The whole question, therefore, turned on the alleged homologation. By the law of Scotland, a person, although not a party to a deed, may make himself so by his acts; but it is also the rule of law, that no person is presumed to bind himself, and therefore, in order to infer homologation, the acts indicative of the intention to be bound must be clear and explicit. The allegation of Mr. Innes, however, merely was, that the

* See 1. Shaw and Ball, No. 182.

July 5. 1822. Marquis of Huntly entered into an agreement to convey his interest under the entail, and his rights under the lease, and that the Duke of Gordon had connected himself with it. But the Duke, so far from ratifying this agreement, did the very reverse—he cancelled and annulled it; and he obtained its cancellation by paying to Mr. Innes a large sum of money. Such an act never could infer homologation; and indeed Mr. Innes could not lawfully plead such a defence, seeing that he had in his pocket the price which was paid for having the whole transaction set aside.—The other Judges concurred.

Against this judgment also Mr. Innes appealed, and maintained the same arguments which he had urged in the Court of Session. The Duke of Gordon also repeated his pleas, and founded on the reversal in the case of Elliot *v.* Pott on 14th March 1821, by which it was found that a prohibition to dispone deprived an heir of entail of power to grant a lease for 77 years. *

The LORD CHANCELLOR moved in both cases, and the House of Lords 'ordered and adjudged, that the interlocutors complained of be affirmed.'

Appellant's Authorities.—(1.)—2. Stair, 40. 29; 3. Ersk. 3. 47; Ayton, July 1. 1800, (No. 5. Ap. Property); Ayton, May 19. 1801, (No. 6. Ib.); Earl of Kinnoull, Jan. 18. 1814, (F. C.); Sommerville, July 16. 1698, (5694); Mackenzie, Dec. 4. 1767, (5665); Anderson, July 15. 1760, (5701); Erskine, Jan. 1682, (5703); Corsar, July 27. 1687, (5710); Linton, Jan. 1729, (5624); Cubbison, Dec. 30. 1724, (10449); Murray, June 13. 1746, (10454); Williamson, Aug. 4. 1761, (10459); Logan, Feb. 18. 1743, (5660); Bridg. Ind. *voce* Witness and Consent.—(2.)—3. Stair, 4. 23; 3. Ersk. 4. 32.—(3.)—Craig, June 13. 1712, (15494); 3. Ersk. 8. 29; Gordon, July 23. 1748, (7281); Mackay, Nov. 23. 1796, (11171); Gordon, Nov. 14. 1749, (15384); Gilmour, March 6. 1801, (No. 9. Ap. Taillie); Dundas, Nov. 29. 1774, (15430.)—(4.)—Bruce, Jan. 15. 1789, (15539); Elliot, March 10. 1814, (F. C.); Hamilton, March 3. 1815, (F. C.)—(5.)—2. Stair, 3. 58; 3. Ersk. 8. 26; 2. Bank. 3. 141; Garnock, July 28. 1725, (15596); Murray, July 5. 1744, (15380); Broomfield, June 29. 1784, (15618); Martin, June 22. 1808, (F. C.); Burn's Eccl. Law, 2. 52; 1491, c. 25; 2. Bank. 8. 115; 1581, c. 101; Macken. Obs. 201; Mack. Inst. 1. 5; Balfour, 237; Henderson, Nov. 21. 1815, (F. C.); 3. Ersk. 4. 9.

Respondents' Authorities.—(2.)—3. Ersk. 8. 51; Stormont, Feb. 1662, (13944); Dillon, Jan. 14. 1780, (15432); Campbell, Feb. 20. 1812, (F. C.)—(3.)—Cathcart, Jan. 21. 1775, (15399); Cases in Mor. 15611, 15519, 15530, 15450, and No. 6. Ap. Tailzie); Muir, Dec. 22. 1808, (F. C.); Malcolm, Nov. 17. 1807, (F. C.); Turner, Nov. 17. 1807, (No. 16. Ap. Tailzie.)—(4.)—1493, c. 50; 1597, c. 15; 2. Mack. 2.—(5.)—Hope's Min. Prac. 145; 2. Mack. 11. 2; 4. Stair, 5. 1. and 4; Dirl. p. 72; Dallas, 605, 618, 632; Jurid. Styles, 203; 5. Bell's Deeds, 75; 1581, c. 101; 1585, c. 2; 1606, c. 3.

J. CHALMER,—SPOTTISWOODE and ROBERTSON,—Solicitors.

(*Ap. Ca. 26. and 27.*)

* See ante, pp. 16. 89.

WILLIAM YOUNG and COMPANY, WILLIAM YOUNG, JOHN YOUNG, ALEXANDER PITCAIRN, and GEORGE YOUNG, Appellants.—*Gifford—Jeffrey—Cuninghame.*
JOHN LEVEN, Respondent.—*Warren—Wetherell—Moncreiff.*

No. 39.

Slander — Reparation — Public Officer — Process. — Circumstances in which it was held, (reversing the judgment of the Court of Session,) that a pursuer having alleged that he had been dismissed from a public office in consequence of the false allegations of certain parties, and had otherwise suffered damage from their acts, was not entitled to recover damages against them jointly and severally, it appearing that the representations and acts alleged by him were not done jointly and severally by the defenders.

Question raised, but not decided, whether an action be relevant for damages on account of representations made, on probable grounds, against a public officer to his superiors in office, and in consequence of which he was dismissed?

July 8. 1822.

1ST DIVISION.
Lord Balmuto.

EARLY in the year 1806, Mr. Leven, who had been for upwards of thirty years engaged in the business of the Excise, was appointed Collector for the county of Fife, and fixed his residence in the town of Burntisland. The appellants, William Young and Company, were distillers near to that town, (William and John Young being the partners,) and Alexander Pitcairn and George Young were members of the magistracy,—the former being the Provost, and the latter one of the Bailies. Immediately prior to Michaelmas 1806, it had become known that Parliament was about to be dissolved; and as Burntisland was the returning burgh, in the district in which it is situated, for sending a representative to Parliament, a good deal of excitement was produced. On the part of the appellants, it was alleged that Mr. Leven made an attempt to canvass for the office of Provost of the burgh, and otherwise to interfere with its politics. Mr. Leven admitted that a proposal had been made by some of the burgesses to elect him Provost, but denied that he had taken any active steps for that purpose, or that he had any political object in view. Having learned, however, that some communication had been made to the Board of Excise and Lords of the Treasury upon the subject, he required the Magistrates of Burntisland to explain to him whether this had been done by them, and in answer they addressed to him the following letter:—'Burntisland, 1st Nov. 1806.—'Sir—After the communication you made to us respectively yes-'terday, we thought it our duty to meet together this morning 'to deliberate upon the business you mentioned, which you may 'believe we feel sincerely for your situation. After deliberating 'fully, the only determination we can bring ourselves to is, that 'we had no hand, directly or indirectly, in bringing any charge 'against you. We cannot see it our duty as Magistrates to in-

July 8. 1822. 'terfere in wiping away any thing that has been laid to your 'charge respecting the late Michaelmas election, more especially 'as we were all perfectly ignorant of any information being lodg- 'ed against you. It is true, Provost Pitcairn mentioned to-day 'to us what he said to you yesterday in conversation, that the 'last time he was in Edinburgh, about the 17th or 18th of Octo- 'ber, that he was accosted by many people there, and by some 'high in rank and office, who inquired at him if what they had 'heard about Collector Leven's interference at the late election 'of Magistrates and Council in Burntisland was true, that he 'wanted to be Provost, &c. Mr. P. gave as evasive and favour- 'able answers as possible; but one gentleman insisted upon hav- 'ing it in writing, which Mr. Pitcairn, with much reluctance, 'complied with on the 22d ult. But, even previous to this in- 'formation, it is evident that the complaint had been lodged with 'the Lords of the Treasury without the knowledge of us, or any 'of us, or any in this place that we know of.

'As we cannot deny your interference at the late election, we 'do not know how we can in any shape interfere in your favour, 'as we understand there is nothing else laid to your charge but 'that interference. These being our sentiments, we see nothing 'we can do, either for or against you, in this disagreeable busi- 'ness. (Signed) Alex. Pitcairn, Thomas Orrock, John Archi- 'bald, George Young, John Haxton.' . . .

A few days thereafter, the Magistrates of Burntisland addressed the following memorial to the Lords of the Treasury:—'That 'your memorialists are aware of the necessity of arming the offi- 'cers of Excise with the most extensive powers, in order to ensure 'the due collection of that most important branch of the public 'revenue; and they rely with perfect confidence on the lenity 'and justice of his Majesty's Ministers, that they will not coun- 'tenance any harsh or unnecessary exercise of these powers, and 'still less permit the abuse of them by their officers for any pur- 'pose unconnected with their proper duties, and protection of the 'public interest. Your memorialists therefore venture, without 'apprehension, to represent to your Lordships, that the inhabit- 'ants of the burgh of Burntisland and its neighbourhood have of 'late suffered much from a most rigorous, unnecessary, and par- 'tial exercise of the authority of John Leven, Collector of Ex- 'cise, and the officers acting under his direction. Your memo- 'rialists further submit to your Lordships, that they are driven 'to complain of the grievances they have already suffered by their 'apprehensions of the future, inasmuch as they cannot help fear- 'ing that the extraordinary and undue rigour which the Collector

'has of late shown a disposition to exercise against certain indi- July 8. 1822.
'viduals of the burgh has not arisen merely from a zeal for the
'discharge of his duty; and they think themselves warranted in
'stating this suspicion by the conduct of the Collector in Septem-
'ber and October last, in interfering and endeavouring to obtain
'the political management of the burgh, and in employing some
'of the officers acting under him as agents for that purpose; and
'they have had occasion to observe that it is since the failure of
'that attempt they have had reason to complain particularly of
'the very undue exercise of his authority, which has been prin-
'cipally directed against such persons as, by resisting his solicit-
'ation, had exposed themselves to his resentment. That though
'your memorialists are persuaded that your Lordships would
'have strongly condemned such illegal and irregular interference,
'they have hitherto forborne to complain, and have no wish to
'excite your Lordships' displeasure, but have stated these cir-
'cumstances only as their justification for earnestly entreating
'that he may be removed from the collection he at present holds,
'with the two officers that act under him in this burgh, and ex-
'changed for any other Collector and officers now employed in
'Scotland.' (Signed) Alex. Pitcairn, *P.*; Thomas Orrock, *M.*;
'John Archibald, *M.*; George Young, *M.*—Burntisland, 10th
'March 1807.'—On the same day William Young and Company addressed the following letter to Mr. Wemyss of Cuttlehill, one of the Deputy Lieutenants of the county, with a view of having the conduct of Mr. Leven and his subordinate officers brought under the consideration of the Lords of the Treasury or the Board of Excise.

'Burntisland, 10th March 1807.—We are exceedingly sorry
'again to trouble you on a very disagreeable subject to us; but
'we hope your goodness will excuse us when we state to you our
'grievances, in consequence of the most oppressive severity and
'resentment of our Excise officers since our last burgh election—
'by Duncan Forbes, supervisor, John Drysdale and William
'Torrence, officers. Indeed, such rigorous and insulting conduct
'we never have heard of being exercised by any officers in the
'Excise. We have suffered so much inconveniency and real losses
'in the conducting of our business, and so much vexation, that
'we find it will not be in our power to carry it on, if left subject
'to the severe oppression of these officers. We can fix upon no
'other reason for their conduct than being influenced by Mr.
'Leven, Collector, who applied to us in the most pressing man-
'ner for our interest to elect him Provost at our last Michaelmas
'election. This we absolutely refused, telling him that our in-

July 8. 1822. ‘terest was engaged in support of our present Provost. We surely have the most perfect confidence that we shall obtain relief, ‘if our case is represented to the Lords of the Treasury, or to the ‘Honourable Board of Excise; and we therefore beg leave to ‘request that you will have the goodness to apply to Mr. Adam ‘or Mr. Ferguson, to lay the same before them. We are confident that you will bear testimony to our conduct and character; ‘and we suppose you are not ignorant of the extraordinary and ‘unequal severity with which Mr. Leven and his officers have of ‘late proceeded against several individuals since said election. ‘We are, &c. (Signed) William Young and Co.’

Mr. Wemyss transmitted this letter, accompanied by one from himself to Mr. Ferguson, member for the county, in which he made several severe reflections upon the conduct of Mr. Leven generally. The memorial and letter were sent by Mr. Ferguson to the Lords of the Treasury; and in consequence of a communication by them to the Board of Excise at Edinburgh, an official letter was addressed, on the 24th of April 1807, by the Solicitor to Mr. Leven, stating that an investigation would take place at Burntisland on the 30th, by which time he presumed that Mr. Leven would be no longer occupied in the collection in which he was then engaged. This letter Mr. Leven alleged he did not receive till the 28th, and the investigation proceeded before the Sheriff at the time appointed. Before, however, it commenced, Mr. Pitcairn, as Provost, laid before the Sheriff a paper, entitled ‘Statement by Provost Pitcairn, in regard to the interference of ‘Mr. Leven in the political concerns of Burntisland,’ and in which he mentioned several circumstances in support of his allegation, and represented that the conduct of Mr. Leven and his officers had become most oppressive and tyrannical since the time when he failed in the election. * The investigation thereupon proceeded, and was directed not merely to an inquiry as to Mr. Leven's interference in political matters, but also as to his conduct towards the traders, and particularly in exacting interest on arrears from William Young and Company. After it was concluded, that Company addressed a letter to the Board of Excise, accompanied by an account-current, in which they represented that they had made two separate payments to Mr. Leven, the one on the 27th November 1804 of £400, and the other on the 18th of January 1806 of £823. 10s., for which he had not given them credit, although they held the receipts subscribed by him.

* The material parts of this Statement will be found recited in the opinion delivered by the Lord Chancellor. See postea, p. 198.

For these sums they claimed credit, and also for a sum of £400 of interest, which they had paid to him on arrears, and which they alleged he was not entitled to exact. July 8. 1822.

The result of the investigation having been reported to the Lords of the Treasury, an order was sent by them to the Board of Excise, in consequence of which, the Secretary was instructed to write the following letter to Mr. Leven:—'August 11. 1807. 'The Commissioners have this day received a letter from the 'Secretary of the Treasury, dated the 8th instant, stating that 'their Lordships have had under consideration this Board's re- 'port, transmitting one from Messrs. Bonar and Grant, relative 'to the investigation into the complaints against your conduct, 'and of other officers in Burntisland. And in regard to the first 'charge, their Lordships are of opinion that there is nothing in 'the evidence which calls for their interference, further than to 'express their entire disapprobation of officers of the revenue 'taking an active part in the local and municipal politics of any 'burgh. But with respect to that part of the second head of the 'charge which particularly affects you, namely that of taking in- 'terest from Messrs. Young and Company for the duties payable 'by them from the legal days of payment to the date of the actual 'receipt of the money, and receiving from Mr. Young a larger 'sum for duties than was actually due, their Lordships consider 'these charges as bearing a very different and much more serious 'complexion, and of such a description as to call for your imme- 'diate dismissal from your situation. In obedience, therefore, 'to their Lordships' commands, the Commissioners of Excise dis- 'miss you from your office of Collector under them, and you are 'to deliver over the charge thereof, together with the books and 'stores, and your commission, to Mr. Campbell, General Super- 'visor, who is directed to repair to Burntisland for that purpose.'

At the same time the following circular letter was issued on the subject by the Board:—'In consequence of complaints having 'been presented to his Majesty's Treasury against the Collector 'and two other officers of Excise, for interfering in the politics of 'a burgh, and other improprieties of conduct, and their Lord- 'ships having had under their consideration the result of the in- 'vestigation which took place regarding the same, are pleased, by 'letter dated 8th instant, to acquaint the Commissioners of Ex- 'cise, that, with respect to the first charge, they are of opinion 'there is nothing in the evidence which calls for their Lordships' 'interference, further than to express their entire disapprobation 'of revenue officers taking any active part in the local and muni- 'cipal politics of any burgh, as such conduct must necessarily

July 8. 1822. ‘ hamper them in the due discharge of their duty as a revenue ‘ officer, and expose them to suspicions which cannot but be at- ‘ tended with prejudicial consequences; and their Lordships have ‘ therefore desired to be expressed to the two officers their strong ‘ displeasure at their conduct. But with respect to that part of ‘ the second head of charge which particularly affects the Collector, ‘ namely that of taking interest from traders for the duties pay- ‘ able by them from the legal day of payment to the date of the ‘ actual receipt of the money, their Lordships consider these ‘ charges as bearing a very different and much more serious com- ‘ plexion, and of such a description as to call for the immediate ‘ dismission of the Collector from his situation. In obedience to ‘ these orders, the Commissioners have dismissed this person im- ‘ mediately from the office of Collector, and have reprimanded the ‘ two officers. And I am directed by the Board, that if in any ‘ instance you shall be found to have thus improperly taken in- ‘ terest from any of your traders for money due by them to the ‘ revenue, you will also certainly receive the same censure; and ‘ you, your supervisor, and officers, are in no manner of way to ‘ interfere or meddle with the local or municipal laws of any ‘ burgh, as before mentioned, or in elections, as so strongly point- ‘ ed out in your general instructions, otherwise you will meet with ‘ the severest displeasure of the Board; and that none may pre- ‘ tend ignorance, you will enter this letter into your general letter- ‘ book.’

Soon after the dismissal of Mr. Leven, an action was raised by the Board of Excise against William Young and Company in the Court of Exchequer for payment of arrears of duties, which they had refused to pay, on the ground of the alleged double payments which had been made by them to Mr. Leven. Judgment passed against them, on the ground (as was alleged by them) that such a plea was not admissible against the Crown, and that they must seek their relief from Mr. Leven. A report of this trial having appeared in the Edinburgh Evening Courant, William Young and Company addressed and published a letter to the Editor, explaining that such was the ground of the decision, and that they had ‘ brought an action before the Civil Court against the Col- ‘ lector, not only for the repetition of the large sums of principal, ‘ but also interest, which had been illegally exacted from us.’ They further stated, that ‘ the Collector was dismissed by the ‘ Lords of the Treasury for receiving from us a larger sum for ‘ duties than was actually due, or was carried to account.’ They accordingly brought the action here alluded to; but, after a great deal of investigation, Mr. Leven was assoilzied, with expenses,

and this decision was affirmed on appeal. That gentleman then raised an action against William Young and Company,—William Young and John Young, the individual partners,—and Alexander Pitcairn, concluding for £20,000 of damages, on the grounds, which he thus set forth in the summons:— July 8. 1822.

'In the first place, the said William Young and Company, or 'the said William Young and John Young, and the said Alex- 'ander Pitcairn, who, with the concurrence of certain members 'of the Town-council of Burntisland, over whom they had an in- 'fluence, secretly transmitted to the Lords Commissioners of our 'Treasury in London, and to the Commissioners of Excise in 'Edinburgh, certain complaints against the pursuer, falsely and 'maliciously alleging that he had illegally interfered in politics 'while he held the office of Collector of Excise, and that he had 'used the influence derived from his office, unduly, to procure 'votes in his favour, and that he had harassed and oppressed 'those traders within the bounds of his collection who are said to 'have opposed his views. 2dly, The said William Young and 'Company, or the said William Young and John Young, falsely 'and maliciously alleged to the Commissioners of Excise, or to 'certain officers of Excise under them, that the pursuer had un- 'justly and dishonestly charged and uplifted from the said Wil- 'liam Young and Company, or William Young and John Young, 'a larger sum for duties than was actually due by them to Go- 'vernment, or was carried to account by him. 3dly, The said 'William Young and Company, or the said William Young and 'John Young, not only repeated, in various public companies, 'their calumnious and defamatory charges against the pursuer, 'but thereafter withheld duties from Government, on pretence 'that they had overpaid certain large sums of money to the pur- 'suer while Collector of Excise, and openly made the same false 'and malicious allegations in their defence against an action at 'the instance of the prosecutor for the Crown against them in our 'Court of Exchequer in Scotland. 4thly, The said William 'Young and Company thereafter inserted or caused to be in- 'serted in the Edinburgh Evening Courant, of date the 17th 'day of July 1810, a most calumnious advertisement, to the ma- 'nifest hurt and prejudice of the character and reputation of the 'pursuer, as will appear from a copy of that newspaper herewith 'produced. 5thly, The said William Young and Company, or 'the said William Young and John Young, having raised an 'action in the Court of Session at their instance against the pur- 'suer, for payment of the sums of money which they falsely and 'maliciously alleged had been illegally exacted from them by the

July 8. 1822. 'pursuer, and knowing that the pursuer had publicly advertised 'for sale a property in the town of Greenock belonging to him, 'they, upon the dependence of the said action, raised and exe- 'cuted letters of inhibition at their instance against the pursuer, 'for the malicious purpose of injuring the credit of the pursuer 'to the utmost of their power. 6thly, The said William Young 'and John Young, or either of them, raised and circulated a most 'groundless and injurious report that the pursuer had burned or 'destroyed his official books with some fraudulent intention. And, 'lastly, the said William Young and Company, and the said 'William Young and John Young as individuals, and the said 'Alexander Pitcairn, to the great injury of the pursuer's reputa- 'tion and fortune, raised and circulated a variety of other un- 'founded and calumnious reports, to be more particularly conde- 'scended on in the course of the process to follow hereon.'

Mr. Leven thereafter brought a supplementary action against George Young, and in which he concluded against all the defenders jointly and severally. He then moved for and obtained a diligence for recovering from the Board of Excise the Memorial by the Magistrates of Burntisland to the Lords of the Treasury in March 1807, the letter by Young and Company to Mr. Wemyss, and all other letters transmitted to the Lords of the Treasury or Board of Excise respecting his conduct, and the Statement of Provost Pitcairn prior to the investigation. The Commissioners of Excise having objected that they were neither bound nor entitled to exhibit these documents, the objection was repelled both by the Lord Ordinary and the Court. The defenders then moved for a diligence to recover the reports which, in consequence of the investigation, had been made to the Board of Excise, and by them to the Lords of the Treasury; but this having been resisted by the Board of Excise, the Lord Ordinary refused the diligence, 'in respect the pre- 'sent action of damages at the instance of John Leven, late Col- 'lector of Excise, is founded upon the allegation of false and inju- 'rious charges having been made by the defenders against the pur- 'suer to the Board of Excise in Scotland, and to the Lords of the 'Treasury; that the investigation which took place by authority of 'the Board, or the opinion the Commissioners may have formed 'upon such information, cannot, in the opinion of the Lord Ordi- 'nary, although produced, afford a well-grounded defence against 'the conclusions of the present action, and that the Board are in no 'shape bound to exhibit the papers called for by the defenders.' To this judgment the Court adhered, and refused to allow an appeal.

Thereafter the Lord Ordinary, on advising the case on the merits, found, 'That a memorial, in name of the Provost and

'Magistrates of Burntisland, bearing date the 10th March 1807, July 8. 1813.
'and subscribed by Alexander Pitcairn, the defender, then Pro-
'vost, and by George Young, a member of the Council of Burnt-
'island, and son of William Young, was presented to the Lords
'of the Treasury, containing certain charges against the pursuer
'as acting oppressively and unjustly in his character of Collector
'of Excise, and interfering with the politics of the burgh, and
'craving his removal: That at the same time a letter, subscribed
'by William Young and Company, was presented to William
'Wemyss, containing similar charges of gross and grievous op-
'pression by the pursuer against them in carrying on their trade
'as distillers, and requesting Mr. Wemyss to transmit their com-
'plaints to Mr. Fergusson, in order to be laid before the Lords of
'the Treasury, in expectation of receiving relief: That, in con-
'sequence of these complaints, directions were given by the Trea-
'sury Board to the Commissioners of Excise in Scotland to in-
'quire into the truth of the allegations contained in these various
'complaints: That these proceedings took place without any
'communication with the pursuer, and without his knowledge;
'on the contrary, upon some surmises going abroad that such
'existed, on the pursuer applying to the Magistrates and Council
'to know the truth of such reports, he received an answer, sub-
'scribed by Alexander Pitcairn, George Young, and two other
'members of the Council, denying any knowledge of such com-
'plaints: That the first direct information that the pursuer had
'that any complaints had been made, or proceedings instituted
'against him, was on 28th April 1807, on his return home, after
'having been for some time absent on official duty, when he re-
'ceived a letter from the Solicitor of Excise, informing him, that
'in consequence of some complaints by the Magistrates of Burnt-
'island, he was directed to investigate the facts, and for that pur-
'pose he and Mr. Grant were to be at Burntisland on the morn-
'ing of 30th April 1807; adding, 'I believe your collection will
"then be over:' That, from the proceedings which took place
'before the Sheriff-substitute of Fife, it appears that the defender
'Alexander Pitcairn took an active charge, and produced a State-
'ment, subscribed by himself, which he offered to instruct: That
'the principal witnesses then examined were the defenders, Alex-
'ander Pitcairn, William Young, and his three sons, who had
'either subscribed the memorial or letter above referred to, which,
'at their request, was laid before the Lords of the Treasury, and
'occasioned the investigation then going on, and the dismissal of
'the pursuer from the respectable and lucrative office of Collector
'of Excise for the county of Fife: That from the private corre-

July 8. 1822. 'spondence of the defenders themselves, and also letters from 'William Young to the Solicitor of Excise, and the personal 'communications alluded to in these letters by the defenders with 'the official persons intrusted with the investigation, the com- 'plaints and charges made against the pursuer for interference in 'politics, malversation in office, exacting double rates, and charg- 'ing interest, is to be held as one and the same proceeding, tend- 'ing to the same effect, and having the same object in view, viz. 'the removal of the pursuer from his office of Collector: That, 'after his removal, the same line of conduct and animosity against 'the pursuer continued; and in different applications, made for 'copies of the proceedings and investigation taken at Burntisland "in name of the Magistrates and petitioners,' the declared object 'of the application being to support the decision of the Lords of 'the Treasury, and to resist any application that might be made 'by the pursuer to be reponed against the sentence of dis- 'missal, and also in the proceedings before the Sheriff-substitute, 'when an objection was stated to the examination of Messrs. Pit- 'cairn and Young as parties interested, the answers proceed upon 'the propriety of the same to support the complaints, and, as con- 'nected therewith, shows the joint interest the defenders took to 'support the complaints: That a suit in Exchequer being brought 'against William Young and Company for payment of duties to 'the Crown, they stated in defence against their liability the al- 'leged illegal exactions by the present pursuer when Collector, by 'levying double payments for the same duties, and charging in- 'terest on the duties from the time they became due, till paid: 'That judgment went against William Young and Company: 'That notwithstanding so large a sum as £1223. 10s. was al- 'leged to have been illegally exacted by Mr. Leven, no step was 'taken to recover this till nearly three years after dismissal, when 'an action was brought into this Court by William Young and 'Company against the present pursuer for repetition of the above 'sum of £1223. 10s. of duties, and interest, said to have been 'illegally exacted: That this action of repetition was founded on 'the same grounds that the charges of rigorous, unnecessary, and 'undue exercise of his authority were formerly made to the Lords 'of the Treasury and Commissioners of Excise; but, upon a long 'discussion and full investigation, this Court found that the pur- 'suers had not made out their case, but the same was disproved 'by the productions made by the then defender; and therefore sus- 'tained the defences, assoilzied the defenders, and found expenses 'due: That this judgment was affirmed on appeal, with £70 'costs. By these judgments the present pursuer has been assoil-

'zied, and the grounds of action against him found to be dis- July 8. 1822.
'proved. Upon the same principles, the charges and complaints
'by Alexander Pitcairn, George Young, and William Young
'and Company, against the pursuer, for oppression and malver-
'sation in office, must be held to be equally unfounded. And in
'respect the pursuer's dismissal from office proceeded from the
'unfounded and groundless complaints stated by the defenders
'against him, whereby he sustained a grievous injury and severe
'loss in point of income, repels the defences, finds the whole de-
'fenders, conjunctly and severally, liable to the pursuer in da-
'mages; but, before further answer as to the amount, appoints
'the pursuer, within ten days, to lodge a specific condescendence
'of the amount of damages claimed, and appoints the defenders
'to answer the same within ten days after being lodged.'

Against this judgment the defenders reclaimed, and the Court then pronounced this interlocutor:—'Find that the first, second, 'and fourth articles of the principal and supplementary libels 'are relevant and proven: Find that the pursuer's dismissal from 'office proceeded from the unfounded and groundless com-'plaints stated by the defenders against him, whereby he sus-'tained a grievous injury and severe loss in point of income: Re-'pel the defences pleaded for William Young and Company, 'and also the separate defences pleaded for the said Alexander 'Pitcairn and George Young: Find the whole defenders in both 'actions conjunctly and severally liable to the pursuer in da-'mages; but, before answer as to the amount of the damages, 'appoint the pursuer to lodge, within ten days, a specific conde-'scendence of the same, for the consideration of the Court; and 'find the whole defenders in both actions liable, conjunctly and 'severally, to the pursuer in the expenses of process.' To this interlocutor they adhered, and thereafter remitted the following issues to the Jury Court:—'What loss and damage the pursuer 'has sustained by being dismissed from the office of Collector of 'Excise for the county of Fife, on the 13th day of August 1807, 'in consequence of the unfounded and groundless complaints of 'the defenders?

'What damage the pursuer has sustained, independent of the 'loss arising from his dismissal from said office, by the calumnies 'contained in the first, second, and fourth articles of the sum-'mons found relevant and proven, viz.—1. The said William 'Young and Company, or the said William Young and John 'Young, and the said Alexander Pitcairn, with concurrence of 'certain members of the Town-council of Burntisland, over 'whom they had an influence, secretly transmitted to the Lords 'Commissioners of the Treasury in London, and to the Com-

July 8. 1822.

'missioners of Excise in Edinburgh, certain complaints against 'the pursuer, falsely and maliciously alleging that he had ille- 'gally interfered in politics while he held the office of Collector 'of Excise, and that he had used the influence derived from his 'office, unduly, to procure votes in his favour; and that he had 'harassed and oppressed those traders within the bounds of his 'collection who are said to have opposed his views.—2. The 'said William Young and Company, or the said William Young 'and John Young, falsely and maliciously alleged to the said 'Commissioners of Excise, or to certain officers of Excise under 'them, that the pursuer had unjustly and dishonestly charged 'and uplifted from the said William Young and Company, or 'from the said William Young or John Young, a larger sum 'for duties than was actually due by them to Government, or 'was carried to account by him.—3. The said William Young 'and Company thereafter inserted or caused to be inserted in the 'Edinburgh Evening Courant, of date the 7th day of July 1810, 'a most calumnious advertisement, to the manifest hurt and 'prejudice of the character and reputation of the pursuer. 'The damages claimed are £20,000, of which, for the loss of 'office during the period between 13th August 1807, when the 'pursuer was dismissed, and the 5th of July 1809, when a new 'arrangement took place, at the rate of £600 per annum, amount- 'ing to - - - - £1023 8 2

'Salary at the rate of £600 per annum, from '5th July 1809 till 5th April 1817, seven 'years and three quarters, amounting, after 'deducting property-tax, to - - 4245 8 2

'Also interest on the above sums quarterly, 'as they became due, amounting, at 5th 'April 1817, to - - - 1084 2 0

'£6352 18 4

'For the value of the situation of Collector of Excise, or £600 'per annum, from the 5th April 1817 until he shall be actually re- 'instated in office, or until he shall be appointed to receive sa- 'lary as above.

'For damages arising, independent of his pecuniary loss, from 'the foul calumnies to which he has been exposed, and the state 'of degradation in which he has been placed, and from the 'cruel state of anxiety and suspense in which he has been kept 'for upwards of ten years.'*

* Before these issues were tried, an official letter had been sent to Mr. Leven, announcing that he was to be reinstated in his office of Collector as soon as a vacancy occurred; and he was subsequently allowed a pension of £400 per annum.

A verdict was then returned by the jury, by which, 'in re- July 8. 1822.
'spect of the matters of the said issues proven before them, they 'assess the damages due by the said defenders to the said pur- 'suer at the sum of £2000 sterling.'

Mr. Leven, conceiving that these damages were too small, moved the Court for a new trial; and the Court accordingly set aside the verdict, remitted the case to be again tried by a jury, and directed that a separate return should be made on each of the issues. In consequence of this remit, a verdict was returned by another jury, 'that, in respect of the matters of the said issues proven be- 'fore them, they find for the pursuer on the first issue £1800, 'and on the second issue £200, and assess the damages at said 'sums accordingly.' The Court thereupon (10th December 1818) found 'the defenders conjunctly and severally liable to the pur- 'suer in the two sums of £1800 and £200 sterling of damages, 'and decern for the same accordingly;' and they also found them liable in £366 of expenses, including those of the new trial.*

The defenders then appealed on the following grounds:—

1. That the action was irrelevant, because, as Mr. Leven was a public officer, who the defenders believed had been guilty of illegal conduct in his official capacity, and as they had made their complaints to his superiors, and communicated them to no other parties than those to whom it was necessary to communicate them in order to the investigation; and as they had done so on probable grounds, as was established by the circumstance of Mr. Leven having been dismissed; and as no malice had been proved against them, the action ought to have been dismissed.

2. That as the dismissal of Mr. Leven had been on account of the unlawful exaction of interest, which had not been complained of by the defenders, but had been discovered in the course of the investigation, it was not consistent with justice to subject them in damages for his loss of office, seeing that it did not proceed on any of the charges which they had made against him; and if the Lords of the Treasury and the Board of Excise had erred in so dismissing him, the defenders ought not to be made answerable on that account.

3. That the Court of Session ought not to have allowed the Board of Excise to have produced the documents called for by Mr. Leven, seeing that they were private communications made as to the conduct of a public officer, which ought, on principles of expediency, not to be disclosed; and at all events they acted unjustly in withholding from the defenders the documents which they were desirous to have recovered in support of their defences,

* Not reported.

July 8. 1822. while at the same time they allowed the pursuer to obtain production from the same quarter of the documents in support of his action.

4. That the issues which were sent to the Jury Court were erroneous, and of such a nature as to preclude the defenders from pleading their lawful defences; and that although it was competent to grant a new trial on account of damages being excessive, yet there was no authority for doing so because they were too small.

5. That the interlocutors were inconsistent with the libel and relative evidence, as the defenders were found conjunctly and severally liable in damages, although it was established that several of them were no parties to the acts for which these damages were awarded;—and,

6. That it was contrary to justice to subject them in the expenses of the new trial, on which the same verdict as the one which was set aside had in substance been returned.

To these pleas it was answered,—1. That the action was not rested on the ground that the pursuer had been dismissed for taking interest, but that he had suffered loss in consequence of the misrepresentations and the false charges exhibited against him by the defenders; that even with regard to the charge of exacting interest, it had been entirely misrepresented by the defenders, and the Board of Excise had become so satisfied that the pursuer had been unjustly treated, that shortly before the issues were sent to the Jury, he had been reinstated in office.

2. That although a public officer may have been dismissed on one charge as well founded, yet this could not protect the complaining parties, who made false and calumnious accusations, from being liable in indemnification; and that such had been the case on the part of the defenders, because both the charge of interference in political matters, and of withholding large sums of money, had been disproved; and further, that the advertisement in the newspapers was of itself sufficient to entitle him to damages;—and,

3. That as the defenders had been united together in the attacks which they had made upon the pursuer, he was entitled to redress from them conjunctly and severally.

The House of Lords found, 'That none of the acts alleged by 'the respondent, in his first and supplementary summons of da- 'mages, to have been done by all or some or one of the appel- 'lants, the defenders in such actions, are so alleged or proven, as 'to justify the finding that the first, second, and fourth articles 'of the principal and supplementary libels are relevant and pro- 'ven; and that the whole defenders in both actions are con-

'junctly and severally liable to the pursuer in damages, and 'therefore that the proceedings in the said actions are founded in 'error, and ought to be reversed; and on this ground it is or- 'dered and adjudged that all the interlocutors complained of be 'reversed, and that the appellants be assoilzied in such actions; 'the Lords not meaning hereby to determine any question with 'respect to any particular ground of appeal alleged by the ap- 'pellants as applicable to any of the several interlocutors com- 'plained of.' July 8. 1822.

LORD CHANCELLOR.—My Lords, in this cause of Young *v.* Leven, we have had copies sent us of the condescendence which was lodged in the action for damages, (which was of rather a singular description,) and of the answers of Messrs. Young and Company, (which company consists of William Young and John Young,) and also the answer of Alexander Pitcairn and George Young, all of which I have very carefully read.

My Lords, in the present state of the business, it will be desirable that I should not go minutely through this case. But the appellants state the case thus:—After representing that William Young and Company—a company formed, as I before stated, of William Young and John Young,—had long been established in the neighbourhood of the royal burgh of Burntisland in Fifeshire, as distillers and extensive farmers,—and after describing the extent to which they had carried on their business, and the extreme regularity with which they had carried it on, they proceed to represent what they state to have been the conduct of Mr. Leven, the Collector of Excise under whose survey they were, and the officers under him; and with respect to the allegations on both sides, perhaps it may be enough to say, that they are extremely contradictory to each other. It is then represented that the burgh of Burntisland is one of four burghs, in the district of Scotland in which it is situated, that send a representative to Parliament; that the member is chosen by a delegate from each burgh, who is chosen by the respective town-councils; and they state that this makes a seat in these corporations generally an object of some consequence; and those who know the manner in which the representatives in Parliament are elected in Scotland, can have little doubt upon that point.

My Lords, Mr. Leven suggests that his interposition with respect to the local politics of the place had no connexion whatever in fact with what may be called the election politics of the place; by election politics meaning elections for members of Parliament. On the other hand, it is the purpose of the appellants to represent that Mr. Leven, in consequence of a general election of members of Parliament being expected in Burntisland—that being what is called the returning burgh, entitling that burgh to the casting vote in case there should be an equality of votes,—a connexion with that corporation became, for that reason, of a good deal of consequence with respect to the elections for those four

July 8. 1822. burghs; and that, under those circumstances, as they allege, the respondent interfered in the politics of the burgh, and endeavoured to place himself at the head of the corporation by canvassing for the office of Provost; and they insist that his conduct was contrary both to positive statute, and to the special regulations which the Board of Excise circulate for observance by all their subordinate officers; and then they state, that the established Magistrates of the burgh were the parties first called upon to notice the conduct of the pursuer, as this was manifestly calculated to form a strong restraint on the traders in exciseable goods within the burgh, and thus to affect the independence of the corporation itself. But the Magistrates, as a corporation, at first, in the early part of the winter 1806-7, from a wish to spare the respondent, refrained from complaining, and their forbearance at that period has since been eagerly laid hold of by the respondent. Then they represent 'that the respondent's conduct having been represented to his superiors by both parties interested in the election of 1806, he applied to the Magistrates for a letter exculpating him from the charges. But the Magistrates could not go this length; on the contrary, they were obliged to tell the respondent that they thought the charges true, and they wrote to the respondent the following letter, in the statements of which the respondent, as they put it, acquiesced, as he never returned any answer to it.'

Now, my Lords, this letter, which was sent by the Magistrates, was of the date of the 1st of November 1806, and the memorial I shall have occasion to mention to your Lordships presently, was not dated till the 10th of March 1807; so that this letter cannot have a reference to that memorial as a communication made either to the Board of Excise or the Lords of Treasury, but must have reference to some other communication made by the Magistrates. What they state is this—[His Lordship here read the letter of 1st November 1806. See p. 179.] This letter is signed 'Alexander Pitcairn,—Thomas Orreck,' who is made no party to this suit,—'John Archibald,' who is made no party to this suit, '—George Young,' who is made a party to this suit,—and 'John Haxton,' who is not made a party to this suit.

They then proceed to represent that the conduct of the respondent was very much influenced by his disappointment in the pursuit of this office of Provost of the burgh, that he ceased to employ individuals whom he had before employed, and particularly this Mr. Haxton, who was Dean of Guild and a corporator, and that, by his officers, he was particularly rigorous to the appellants; and then they go the length of asserting, as a motive for that rigour, their refusing to vote for him, and to further his intention to become Provost of this burgh.

My Lords, upon the 10th of March 1807, the Magistrates of Burntisland sent the following memorial to the Lords of the Treasury:—'Your memorialists are aware of the necessity of arming the officers of 'Excise with the most extensive powers, in order to ensure the due col-'lection of that most important branch of the public revenue, and they

'rely with perfect confidence in the lenity and justice of His Majesty's July 8. 1822.
'Ministers, that they will not countenance any harsh or unnecessary ex-
'ercise of those powers, and still less permit the abuse of them by their
'officers for any purpose unconnected with their proper duties, and the
'protection of the public interest. Your memorialists therefore venture,
'without apprehension, to represent to your Lordships, that the inhabit-
'ants of the burgh of Burntisland and its neighbourhood have of late
'suffered much from a most rigorous, unnecessary, and partial exercise
'of the authority of John Leven, Collector of Excise, and the officers
'acting under his directions.'

It will be in your Lordships' recollection, that in the course of what was stated from these papers, and stated from the Bar, it was represented that the complaint was of the officers acting under the direction of John Leven; but no one can read this passage without seeing that there is imputed to Mr. John Leven himself, as well as his officers, 'a most 'rigorous, unnecessary, and partial exercise of his authority.' Then they say, that they 'further submit that they are driven to complain of the 'grievances they have already suffered by their apprehensions of the 'future, in as much as they cannot help fearing that the extraordinary 'circumstances and undue rigour which the Collector has of late shown,' (this is the Collector again, and not the officers,) 'a disposition to exer-'cise against certain individuals of the burgh, has not arisen merely from 'zeal for the discharge of his duty; and they think themselves warranted 'in stating this suspicion by the conduct of the Collector in September 'and October last, in interfering and endeavouring to obtain the political 'management of the burgh, and in employing some of the officers acting 'under him as agents for that purpose.' It appears that the parties construe these words, 'the political management of the burgh,' in different senses. On the part of Mr. Leven it has been represented, that all he had in view (and that view was suggested to him by others) was, that if he was placed in the situation of an officer of the burgh, he might remedy some malversations with respect to the property of the burgh; and that this being known to be his view, he was opposed by certain persons on that very account. Others represented, that as this was the returning burgh, it would naturally have a very great weight in the return of the members to Parliament, and that the obtaining this was his object.

Then they go on to state, 'And they have had occasion to observe, 'that it is since the failure of that attempt they have had reason to 'complain, particularly of the very undue exercise of his authority, 'which has been particularly directed against such persons as, by re-'sisting his solicitation, had exposed themselves to his resentment. That 'though your memorialists are persuaded that your Lordships would 'have strongly condemned such illegal and irregular interference, they 'have hitherto forborne to complain, and have now no wish to excite 'your Lordships' displeasure, but have stated these circumstances only

July 8. 1822. 'as their justification for earnestly entreating that he may be removed 'from the collection he at present holds, with the two officers that act 'under him in this burgh, and exchanged for any other collector and 'officers now employed in Scotland.' Your Lordships will notice this concluding passage of the memorial particularly, because, with reference to the subject of Mr. Leven being removed by the Lords of the Treasury, it is contended on the part of the appellants that that was a step on the part of the Lords of the Treasury going much further than they intended, and that this was only an intimation that, for the reasons here stated, he might not be removed absolutely from his situation as an officer of Excise, but removed to some other place, and in some other place might hold the situation of an officer of Excise. At the same time it is but fair to remark, that, on such a memorial as this, if they made good the allegations that are stated in this memorial, it was a very difficult thing for those who were to act upon the memorial, considering the nature of the circumstances stated, to say you cannot be permitted to remain an officer of Excise in Burntisland on account of your conduct as an officer of Excise; but we expect that if we remove you to another place, you will forget all your political interference as an officer of Burntisland, and will make a very fit and proper officer elsewhere. My Lords, this memorial was not signed either by William Young or by John Young. Neither William Young nor John Young were Magistrates.

The appellants state, (and I will read their own statement,) 'that whilst this application was transmitted through the Magistrates of Burntisland, the appellants were advised also to get their application for an inquiry into Mr. Leven's conduct backed by the member of Parliament for the county. They therefore addressed a letter to Mr. Wemyss, one of the Deputy Lieutenants for the county, and who had a large estate adjoining to the burgh, in the following terms'—[His Lordship then read the letter. See p. 181.] Then, in the Case which they have laid upon your Lordships' table, they desire it to be noticed, that it was not so much of the conduct of the respondent, as of his subordinate officers, that the appellants complained; but it appears to me very difficult to state that this was not a representation that the subordinate officers were acting under his influence, and that he was induced to do as he did by that which they state as the motive for his conduct.

My Lords, Mr. Wemyss forwarded this representation to Mr. Fergusson, then member of Parliament for the Fife burghs; and your Lordships will recollect there was some intimation at the Bar that the politics of the day in 1807 had something to do with this, and that there was an intention of electing a member for these burghs of a particular way of thinking in politics; but it turns out that though the complaint was made during the Administration which began in February 1806, and which existed till 1807, yet that the final act of the Treasury was an act done in the time of the Administration which succeeded the one

that had existed from February 1806 to the beginning of 1807; so that the complaint was made in the time of one Administration, and the act done upon it in the time of the other. July 8. 1822.

Mr. Wemyss, in transmitting this application to Mr. Fergusson, who was then member of Parliament for the Fife burghs, certainly speaks very strongly in his letter with respect to Mr. Leven. One wonders a little, considering the part he actually took, that Mr. Wemyss himself was not made a defender in this action. His letter is in these terms:—'The enclosed I received yesterday. Mr. Young is a man I have long 'known, and is much respected in his line. He carries on business to 'a great extent, and is one of the greatest improvers of land we have 'in the county; and if an Excise officer takes a dislike to a distiller, he 'can continually harass him, without being of the smallest use to the 'revenue. I know Mr. Leven was much disappointed at not being 'made Provost of Burntisland at last election, and that he is a man of 'very violent temper, and have no doubt he will trouble Young as much 'as he can. Some time ago, Captain Halkett of the Royal Navy, the 'minister of Aberdour, and myself as Depute Lieutenant for the parish, 'intended applying for his (Collector Leven's) removal on account of 'his very bad usage of the sailors' wives, fathers, and mothers who went 'to receive money from him, not only paying them irregularly, but 'abusing them for troubling him; but as Sir William Erskine, the 'member for the county, was not in London, we did not go on with it. 'I am perfectly convinced, from what I know of the man, you should 'lose no time in getting him removed.'

As I understand the Case, the gentleman to whom this letter was addressed, namely Mr. Fergusson, did write to the Lords of the Treasury, expressing very strongly his hope that Mr. Leven would be removed.

My Lords, in consequence of these representations to the Treasury, an inquiry was directed to be made into the conduct of Mr. Leven; and a gentleman of the name of Bonar, who was second Solicitor to the Excise, received the directions of the Board of Excise, in consequence of which he wrote to the respondent, on the 24th of April 1807, a letter stating that he had been directed by the Board, in consequence of a remit from the Treasury, to proceed along with Mr. Grant, general surveyor, to make an investigation into some complaints by the Magistrates of Burntisland, and that he had fixed for going over to Burntisland on that business on the morning of Thursday the 30th April, and taking the examination of such witnesses as might be adduced in regard thereto upon oath before Mr. Jameson, Sheriff-substitute. 'Your 'collection will then, I believe, be over, so that I suppose you can at-'tend; and it will likewise be necessary that Mr. Forbes, supervisor, 'shall also attend, of which you may acquaint them.' There is a good deal of representation contained in the Case on the part of the respondent, that he had no intimation given him of the intention that there should be this inquiry, till a day or two before the inquiry was set on foot; and

July 8. 1822. much complaint is made of that, and likewise much complaint founded upon this allegation, that these proceedings on the part of the Magistrates were secret proceedings, and had not been disclosed to him, as proceedings intended to be had, with that degree of fairness which would enable him to know that the inquiry was to be made, and to meet the inquiry as he might or could otherwise have met it.

My Lords, the Case then goes on to state the commencement of the investigation, and it very particularly details the Statement then made by Mr. Pitcairn, and he alone seems to have made the charge upon which the witnesses were examined, and the inquiry proceeded; and I feel it to be proper to state this to your Lordships, because great stress was laid upon it in the discussion at the Bar. After mentioning Mr. Leven's canvass for the Provostship, and that that was unsuccessful, he proceeded to state—'After this, Mr. Leven's conduct was such as gave us 'every reason to suppose that he had neither laid politics aside, nor was 'sorry for his interference in them. He gave public dinners to the 'people that had supported him, and dined with some that I am convinced he would have disdained to have been seen in company with 'on any other occasion. Had he shown his resentment for his disappointment by only turning off his tradesmen, or giving public dinners to his 'supporters, we would not have made such conduct the subject of an 'application to the Treasury; but it did not terminate there. To show 'his spirit, I will mention one instance, that perhaps on any other occasion would be unworthy of notice. Lately, one of the present Magistrates, Bailie Thomas Orrock," (who is one of the persons that writes the letter, but who is not made a defendant in this action,) 'was passing along the shore, by accident, where an old house had been pulled 'down. Some old wood, fit only for fuel, was thrown out, and some of 'the bakers of the town wanting to buy it, one of them asked Mr. Orrock what it was worth. He said 20 shillings, and added jocularly, who 'bids more? or something to that purpose. The Collector was pleased 'to summon him before the Justice of Peace Court to prove that he was 'an auctioneer without license, in order, no doubt, to throw a stigma on 'the Magistracy of the burgh. But the Justices saw through his design, and gave the decision which the case merited. All this I am 'now ready to prove, and I request to be allowed to prove it; but I have 'yet to mention the most serious part of the whole business, which I 'consider as particularly connected with the politics of the burgh, and 'which was the reason for bringing the present complaint. As the 'Messrs. Young did not support the Collector in his politics, they seem 'to have been selected for the objects of his resentment. Even since the 'election, the conduct of the surveying officers has been much changed, 'and has been so hard upon the Messrs. Young in carrying on their business, that if it be not remedied, they are determined to give it up. Mr. 'William Young has been long known as a fair trader; his sons have 'been but a short time in business, but their character is every way fair,

'and in no instance that ever I could learn, have they been detected in 'any fraud upon the revenue. Were there any doubts on this head, 'Messrs. Young's free opposition to the Collector would effectually re- 'move them; and as Messrs. Young never used the officers, nor any of 'them, but in the most civil and obliging manner, neither they nor the 'Magistrates could impute this change in the conduct of the officers to 'any other cause than to Mr. Leven's disappointment; and therefore, I, 'as chief Magistrate of the burgh, thought it a duty incumbent upon me to 'make a representation of the business, that an investigation might take 'place, that the grievances complained of might be inquired into, and that, 'if they did exist, they might be remedied, and that in future no trader 'should be distressed by officers of the Excise for the line of conduct 'they may choose to adopt with regard to the politics of the burgh of 'which they are freemen. I had heard frequent accounts of the severe, 'and as it was called, oppressive conduct of the officers who surveyed 'the Messrs. Young; and, on making inquiry, circumstances were men- 'tioned to me, that in my mind went to confirm the accounts which I 'had heard. But, lest I should give a wrong statement, I beg you will 'call on Mr. William Young, and on Mr. John Young who presides 'at the distillery, and then on Mr. George Young and Mr. William 'Young junior, extensive spirit-dealers of the town, who will severally 'state to you their grievances, and, if required, will adduce the neces- 'sary proof. As Provost of the burgh of Burntisland, I request that 'this paper, signed by me, may be produced along with the whole pro- 'ceedings of this inquiry, and that I be furnished with extracts.' July 8. 1822.

My Lords, they then represent that the inquiry on the charges proceeded. I do not trouble your Lordships with stating at present the evidence which was given in support of these charges. The respondent likewise produced a number of witnesses on his behalf. Your Lordships will find all the evidence stated in the papers.

The gentlemen appointed to make the inquiry having made their report to the Board of Excise, there was a letter written by Mr. Pearson, and thereafter another letter written by him, both of which it appears to me material to state to your Lordships. The first, which is dated the 11th of August 1807, is in these terms—[His Lordship here read the letter of dismissal. See p. 183.]

This letter, your Lordships will observe, expresses the entire disapprobation of the Lords of the Treasury of officers of Excise taking an active part in the local and municipal politics of the burgh. With respect to receiving interest from the trader, it states that ground, if not as the sole ground, certainly as one of the grounds of the dismissal; and it is material here to observe, that whether that be a good ground or a bad ground for the dismissal of an officer, this letter states it as the ground, at least as one of the grounds, which the Lords of the Treasury assign.

The circumstances, your Lordships will recollect, were of this nature, that the Excise officers permitted the trader not to pay the duties upon

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the days he ought to have paid those duties, but to pay the duties at subsequent days, taking interest from him computed from the day on which the duty ought to have been paid till the day of actual payment, and carrying that interest, not to the public account, but carrying that interest to their own private and personal account. Now, whether that mode of conduct was or was not a mode of conduct which the Lords of the Treasury should or should not have treated in the manner in which they have treated it in this case, it does appear to me that is a matter with which the defendants in the action had nothing to do. The Lords of the Treasury direct Mr. Leven to be dismissed for this cause, or for this cause among other causes; but whatever weight is to be given to this direction by the Lords of the Treasury on that account, that is not to be visited on those who made the complaint, but is a circumstance which the Lords of the Treasury are to account for, if there be any blame in the conduct of anybody in that respect. And I take this opportunity of simply stating, that, with respect to a subsequent proceeding in the Court of Session, I do not apprehend that any thing which passed in this House with respect to the taking of interest, was a representation of the opinion of any one of this House that that was a proper or a legal mode of proceeding. For whatever difference of opinion there may have been upon the question, (a question now set at rest by act of Parliament,) whether, when a public officer receives money, the interest he makes of it, before he pays it to Government, is an interest he might or might not keep to himself, there is a very wide difference between that case and the case of an officer saying, 'It is at my risk, I have not 'called for the money which is due from the trader,' or the case in which the revenue may call upon him for that interest, on the ground that public policy requires that that sort of dealing with public money should not be permitted. Your Lordships observe, however, that in this letter, as I read it to you, there is also this allegation, 'receiving from Mr. Young 'a larger sum for duties than was actually due.' That expression may bear two constructions, namely, that if he received interest, he had received from Mr. Young a larger sum than was actually due. That, however, does not appear to me to be the real meaning of this passage, because your Lordships find in the history of the transactions that William and John Young did conceive, or, whether they did conceive or not, did charge Mr. Leven with actually receiving in large sums a second payment for sums for which he had before given receipts; and yet, when you come to read the letter of Mr. Pearson,—(the same gentleman who wrote that letter of the 11th of August 1807,)—his second letter of the 14th of August 1807,—you will find that the chief cause of the respondent's dismissal appears to have been this matter of taking interest, for in that letter he does not again mention the circumstance of the charge of receiving more money than was actually due. That letter is a circular letter written by the Board of Excise to all their officers, in consequence of the investigation that had taken place in respect to Leven's conduct.

It is therefore a general act of the Board of Excise, proceeding on the specific ground which is mentioned in this circular letter. [His Lordship here read the circular of 14th August 1807, see p. 183.] Your Lordships observe, there is no mention here of the taking sums beyond what were due, but it is put entirely upon the taking interest. July 8. 1822.

Now those two letters, the one of them alluding to two causes, the latter alluding only to one cause, express distinctly the grounds of the dismissal of this officer; and I observe that in the Court below it has been argued, as it was argued here, that it cannot be maintained, (and undoubtedly it cannot be maintained,) that if, in representations made maliciously and without probable cause, there have been several causes most maliciously, and without proper reason, stated as grounds for animadversion on my conduct, and it turns out that I am not dismissed from my office for any one of those causes, but my dismissal has been owing to a cause which has been stated as a ground for dismissing me;—if there be slander and calumny, malice, and improper motives in the other representations, and if they are representations not made in the course of the administration of justice, nor in any other proceeding which admits of consideration according to the principles of those cases which do occur in the administration of justice, it cannot, I say, be maintained that there is any reason in the world why I should not be able to maintain an action with respect to that slander and that calumny, although it did not lead to the dismissal. In this case, the damages which have been given are damages expressly calculated upon the dismissal from office; and whilst the reasons which are given by the Lords of the Treasury as the reasons for which the respondent is dismissed from office are not those stated by these parties, the consequences of the dismissal from office are taken as furnishing the rule for assessing those damages. There appears, therefore, to have been not any misstatement of the principles of law, but a misapplication of those principles to the circumstances which I am now pointing out.

After this there were representations made to the Board of Excise, and Mr. Leven complained (perhaps justly) that there were difficulties thrown in his way which he represented as unfair; but into this it is not necessary to enter.

My Lords, the appellants afterwards brought an action against Mr. Leven for an alleged balance of duties,—that is, for sums overpaid, and, as supposed, double payments,—the one of £800, and the other of £400, as exhibited in the different receipts they produced. I have read very carefully the papers which were on your Lordships' table when the appeal from the decision of the Court of Session came before us with respect to those double payments of £800 and £400, and I have no difficulty in representing to your Lordships that I concur entirely in the opinion which the Court of Session formed upon that occasion, namely, that it was satisfactorily proved that though receipts had been given for those sums of £800 and £400 specifically, yet, upon looking at the re-

July 8. 1822. ceipts which were afterwards given for larger sums, it was quite clear that Mr. Leven had not doubly charged them in respect of that £800 and that £400. When your Lordships come to consider this case as a case in which all the defendants are made jointly and severally liable for damages,—and where one measure of the damages is this action having been brought by Young and Company, (and that occurring, too, some years after the proceedings with respect to the investigation,)—and when your Lordships also consider that this was an action in which it required considerable attention to develope the whole of the accounts, in such a way as to make out that those were not double charges, and when I will venture to say that there is hardly any man who looked at the papers produced that would not have thought them to be double charges; and because you could go the length (which perhaps some might be disposed to go) of saying that Young and Company must have known they were not double charges, or that they might have known the thing could be explained in the manner in which it was explained, and that therefore they, judging upon the surface of things, and because they judged wrong, they ought to be subjected to damages, and that those damages should be given also against parties who had not been proved to be in any manner whatever connected with those proceedings, is a proposition very difficult to be assented to.

My Lords, an appeal was taken from that proceeding in the Court of Session, relative to the double payments. I have before stated to your Lordships, that there also was a demand for repetition of the interest which had been taken, as well as those sums; and I observe, in this condescendence which I have in my hand, it is represented on the part of Mr. Leven, that this House was of opinion that there was no ground whatever for that repetition of interest. My Lords, I have likewise in my hand the short-hand writer's note of the judgment the House gave, and I am sure it must be in the memory of your Lordships, that we did not mean by any means to state that it was right in Mr. Leven to leave this money in the hands of the traders, and himself to take interest; but if the traders had voluntarily paid this interest, it was a very difficult thing for them to get back again the interest. That was interest which, if anybody was entitled to have it, it was the public that was entitled to have it from Mr. Leven, and not the traders; because that interest had been paid by the traders, in consideration of the agent for the Crown giving them time to pay the principal. It was therefore interest which, if due to anybody, was due to the Crown, and not to Messrs. Young; and upon that ground we thought that this action was not sustainable, and we held that the £800 and the £400 had been satisfactorily accounted for, and we did certainly affirm that decree.

My Lords, Mr. Leven then commenced an action in the Court of Session, in which he claimed a large sum for damages, and the grounds of action were stated, under the circumstances, to be these:—I do not intend to make any observation whatever upon the forms of pleading

which are observed in this case, further than to say this, that I am quite sure that such pleadings as these would not have been allowed to have one minute's consideration in any Court of this country, having regard to the accuracy with which we are required to plead here. In the first place, it is stated in the summons that 'the said William Young and 'Company, or the said William Young and John Young,'—that is, either in their character of a company, or in their individual characters as William and John Young, but whether in the one or the other non constat,—'and the said Alexander Pitcairn, who, with the concurrence 'of certain members of the Town-council of Burntisland, over whom 'they had an influence, secretly transmitted to the Lords Commissioners 'of our Treasury in London, and to the Commissioners of Excise in 'Edinburgh, certain complaints against the pursuer, falsely and mali-'ciously alleging that he had illegally interfered in politics while he 'held the office of Collector of Excise, and that he had used the influ-'ence derived from his office, unduly, to procure votes in his favour, 'and that he had harassed and oppressed those traders within the bounds 'of his collection who are said to have opposed his views.' Now, with respect to those complaints, if the words 'certain complaints' are to be taken to mean the complaints contained in the memorial, your Lordships will allow me to mention again, neither William nor John Young signed that memorial; and if, therefore, William and John can be considered as having taken any part in respect of that memorial, it must be, not because they signed it, for they did not sign it, but it must be because they took some other part in the sending it to the Lords Commissioners of the Treasury, which makes it imputable to them, though they did not sign it. My Lords, it is very remarkable that in the first summons George is no party, but George has signed it; and what is more, if your Lordships will look at the original summons and the supplementary summons, you will find that John and William, (neither of whom signed it, but who still might be, to use the expression which is found in the supplementary summons, 'art and part,') are charged as principals, whilst George, who did sign it, is by the supplementary summons charged, not as a principal, but as only being 'art and part.' Then it is said that William and John were members of the Town-council of Burntisland. They may have been members of the Town-council of Burntisland, but it is impossible that the words 'concurrence of certain members of the 'Town-council of Burntisland' can mean with the concurrence either of William or John; for the expression is, that 'William Young and 'John Young, with the said Alexander Pitcairn, who, with the concur-'rence of certain members of the Town-council of Burntisland, over 'whom they had an influence,' did so and so;—they cannot be persons who, with their own concurrence, did so and so.

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Then the next allegation is this—'That the said William Young 'and Company, or the said William Young and John Young, falsely 'and maliciously alleged to the said Commissioners of Excise, or to cer-

July 8. 1822. ‘tain officers of Excise under them, that the pursuer had unjustly and ‘dishonestly charged and uplifted from the said William Young and ‘Company, or William Young and John Young, a larger sum for duties ‘than was actually due by them to Government, or was carried to ac- ‘count by him.’ Now, my Lords, allow me to call your Lordships’ attention to this, that the first allegation is an allegation which contains not one single word about the uplifting or dishonestly charging a larger sum for duties than was actually due, and is an allegation of complaints having been made to the Lords Commissioners of the *Treasury*. The second allegation is an allegation, not that there was any complaint made to the Lords of the *Treasury* about taking a larger sum for duties from William Young and Company, but that a complaint of this nature was made to the ‘Commissioners of *Excise*, or to certain officers of Ex- ‘cise under them.’ By what rules they proceed in these actions for damages, I cannot undertake to say; but your Lordships know, if this had been a proceeding in our Courts, under the first allegation no evidence would have been permitted to be given that was not evidence to prove that this complaint, and this only, had been made to the Lords Commissioners of the Treasury; and if this first allegation did not contain one single word about uplifting larger sums of money than were due, no Judge in this part of the island would have permitted any evidence to be given of that sort. Then if they had turned round, and had been obliged to go to the second allegation, according to our rules of proceeding, a Judge would have said,—I cannot permit under this allegation any evidence that such and such representations were made to the Commissioners of the Treasury, but here you must confine yourself to allegations and representations being made to the Commissioners of Excise.

There is, my Lords, another circumstance to be remarked, that the charge here is, that they had ‘falsely and maliciously alleged to the ‘said Commissioners of Excise, or to certain officers under them, that ‘the pursuer had unjustly and dishonestly charged and uplifted from the ‘said William Young and Company, or William Young and John Young, ‘a larger sum for duties than was actually due by them to Government, ‘or was carried to account by him.’ You observe that the respondent studiously omits there that the charge was, among other things, for taking interest on the money. He does not say one single word about that in this allegation, and that seems to be excessively material; because, when you come to look at Mr. Pearson’s second letter, which expresses the cause for Mr. Leven’s being dismissed, that letter (which is a circular to all officers of Excise) says expressly that his dismissal was for that which is totally omitted to be mentioned here, namely, the receiving interest upon money which he did not call for the payment of from the trader at the time it was due.

Then, my Lords, comes the third allegation, that ‘the said William ‘Young and Company, or the said William Young and John Young,

'not only repeated, in various public companies, their calumnious and de-
'famatory charges against the pursuer, but thereafter withheld duties
'from Government, on the pretence that they had overpaid certain large
'sums of money to the pursuer while Collector of Excise, and openly
'made the same false and malicious allegations in their defence against
'an action at the instance of the prosecutor for the Crown against them
'in our Court of Exchequer in Scotland.' My Lords, the Judges of the Court of Session were of opinion, and rightly of opinion, that the proceedings in that action being proceedings in a Court of Law, were not proceedings in respect of which damages could be awarded. But your Lordships will permit me to observe here, that, so far as I have proceeded in these three articles, (and the same observation applies to the fourth, the fifth, and the sixth,) the name of Pitcairn is never mentioned in any one of these six as a party in the concern; and with respect to George Young, that in the whole seven he is never mentioned at all.

My Lords, I do not trouble your Lordships in calling your attention further to the third, nor shall I to the fifth, nor to the sixth, nor to the seventh, for this reason, among others, that the Court of Session was of opinion, that except the first, second, and fourth, none of them were relevant; that they were not, therefore, allegations that would admit of the production of proof. I may misunderstand, and before I have done with the matter, I should be glad to be set right, if I am wrong; but I believe it was the fact, that this large condescendence in my hand became part of the proceeding, even before George Young was made a party in the suit,—that is to say, before, by the supplementary proceeding, he was made a party in the suit; and I do not therefore wonder, that, with the exception of a few sentences, his name hardly occurs in the condescendence at all; and yet he is made, under this judgment, jointly and severally answerable for the whole of these damages, and every shilling of them might be taken out of his pocket under the proceedings which have been had.

My Lords, then, in order to enable the respondent to maintain his action, there was a summons against havers, in order to get papers from the Commissioners of Excise. The interlocutor of the Lord Ordinary directed the papers to be produced. The Commissioners of Excise objecting to produce those papers, an interlocutor of the Lord Ordinary disallowed that objection of the Commissioners of Excise. The Excise petitioned the First Division of the Court of Session, limiting, however, their objection to particular papers. The First Division of the Court of Session, however, affirmed the interlocutor of the Lord Ordinary in favour of the now respondent in this appeal, and directed the production of the papers called for. My Lords, it becomes a very material question, not only in this cause, but in others that are now before your Lordships, what ought to be done in cases of that nature? Your Lordships will find, that when the appellants in this cause called for the production of papers from the Board of Excise, in order the better to sustain their defences, the Court of Session thought that they ought not to allow that

July 8. 1823. production. There is a paper containing notes of what the Judges have said upon that subject, and they are right in the fact they state, namely, that, considering the nature of the action, the production of those papers would not assist the appellants at all; and perhaps I may feel an inclination of opinion to say they were right for another reason; but that is a reason not quite equally applying to a case where the one party had the production, and the other party was refused it. I have an inclination of opinion that the reasons on which, in this country, Judges have held that the public Boards should not be called on to produce their papers, might be reasons which might have induced the Court of Session, both at the request of the respondent and the appellants, to say, 'Make the best of your case; but there are reasons of policy, in respect 'of which we cannot order those productions.' However, that will be a question to be more considered in a case, Earl *v.* Vass, which remains for your Lordships' judgment. *

My Lords, this long condescendence was afterwards put in, and Lord Balmuto's interlocutor of the 12th of November 1816 was pronounced, which I do not trouble your Lordships with stating. It is a very long interlocutor. It proves great diligence and attention on the part of the Judge; but I observe the First Division afterwards were of opinion that my Lord Balmuto's interlocutor could not be sustained to the length to which it had gone; and on the 8th of February 1817 this interlocutor was pronounced by the Court of Session:—'Find that the first, second, 'and fourth articles of the principal and supplementary libels are rele-'vant and proven: Find that the pursuer's dismissal from office pro-'ceeded from the unfounded and groundless complaints stated by the 'defenders against him.' Unquestionably your Lordships will have to determine whether that finding of the fact is according to the fact, 'whereby he sustained a grievous injury and severe loss in point of in-'come; Repel the defences pleaded for William Young and Company, 'and also the separate defences pleaded for the said Alexander Pitcairn 'and George Young: Find the whole defenders in both actions con-'junctly and severally liable to the pursuer in damages.'

I should have mentioned to your Lordships, that after the cause was over in the Court of Exchequer against Messrs. Young, the newspapers of Edinburgh, giving, as the newspapers in this town give, an account of the legal proceedings, gave an account of the proceedings in the action, from which Mr. William and John Young thought their character might suffer; and perhaps it would be a little better, if there was rather more mercy shown to character than is displayed in these publications now and then. They published, in consequence, an advertisement—this must have been four or five years, or, at all events, three or four years after the investigation—in which they desire the public to suspend their judgment upon the proceedings, and vindicating their

* See postea, No. 43.

character; and that paper has been considered as a libel against the respondent. Without, however, at present examining whether it is a libel, or is not a libel, and although it was alleged to have been published only by William Young and John Young, yet, without a semblance of any proof that George Young knew of it, or that Pitcairn knew of it, it is found 'that the whole defenders in both actions are conjunctly and 'severally liable to the pursuer in damages; but, before answer as to 'the amount, appoints the pursuer, within ten days, to give in a special 'condescendence of the same, for the consideration of the Court: Find 'the whole defenders liable conjunctly and severally to the pursuer in 'the expenses of process.' July 8. 1822.

Then, my Lords, there were certain proceedings with a view to settle the quantum of damages, and the Court thought proper to direct two issues. The first was, 'What loss and damage the pursuer has sus-'tained by being dismissed from the office of Collector of Excise for the 'county on the 13th day of August 1807, in consequence of the un-'founded and groundless complaints of the defenders?' Undoubtedly the question is, whether he was dismissed from that office in consequence of the unfounded and groundless complaints of the defenders? Because, if he was dismissed from that office, not in consequence of unfounded and groundless complaints, but on the ground of his having taken interest, there is no reason whatever for saying the defenders might not be liable in damages on other accounts; but they could not be liable in damages for dismissal from office, if he was dismissed from office for a cause they justly assigned, or for a cause they did not assign at all. But this goes to a Jury. Your Lordships observe, that, according to the terms of this issue, they are to take it for granted that he was dismissed from office in consequence of the unfounded and groundless complaints of the defenders, and then they state what these complaints are, which your Lordships will see presently. Then, 'What damage the 'pursuer has sustained, independent of the loss arising from his dismis-'sal from said office, by the calumnies contained in the first, second, 'and fourth articles in the summons found relevant and proven, viz. 'First, The said William Young and Company, or the said William 'Young and John Young, and the said Alexander Pitcairn, with the 'concurrence of certain members of the Town-council of Burntisland, 'over whom they had an influence, secretly transmitted to the Lords 'Commissioners of our Treasury in London, and to the Commissioners 'of Excise in Edinburgh, certain complaints against the pursuer, falsely 'and maliciously alleging that he had illegally interfered in politics while 'he held the office of Collector of Excise, and that he had used the in-'fluence derived from his office unduly to procure votes in his favour, 'and that he had harassed and oppressed those traders within the bounds 'of his collection who are said to have opposed his views.' That he was not dismissed upon this complaint, appears to me quite clear. 'Se-'condly, The said William Young and Company, or the said William

July 8. 1822. 'Young and John Young, falsely and maliciously alleged to the said 'Commissioners of Excise, or to certain officers of Excise under them, 'that the pursuer had unjustly and dishonestly charged and uplifted 'from the said William Young and Company, or John Young, a larger 'sum for duties than was actually due by them to Government, or was 'carried to account by him. Fourthly, The said William Young and 'Company thereafter inserted or caused to be inserted in the Edinburgh 'Evening Courant, of date the 17th day of July 1810, a most calumnious advertisement, to the manifest hurt and prejudice of the character and reputation of the pursuer.'

Now, my Lords, nothing is more clear than this, that if these issues had been directed by any Court of Equity in England to any Court of Common Law, that Court would have been bound to suppose that all the parties to these issues as defenders were answerable jointly and severally for those damages. The Court, therefore, which tried the issues, could do no more than say what was the amount of damages. Taking all this statement to be true, (for they must take all this statement to be fact,) they could not try the fact at all;—they could not try for what cause he was dismissed from his office;—nor could they try the question, whether Alexander Pitcairn or George Young were, by reason of any act they had done, or omitted to do, liable to any of that damage which was referred to in the fourth allegation, namely, the advertisement in the Edinburgh Evening Courant;—nor could they consider whether that was a cause of action at all.

My Lords, they try it as well as they can. The damages are supposed to be estimated in this way: 'The loss of office during the period be-'tween 13th August 1807 when the pursuer was dismissed, and the 5th 'of July 1809 when a new arrangement took place, at the rate of £600 'per annum, amounting to £1023:8:2;' then 'salary at the rate of '£600 per annum from 5th July 1809 to 5th April 1817, seven years 'and three quarters, amounting, after deducting property-tax, to '£4245:8:2; also interest on the above sums quarterly as they be-'came due, amounting at 5th April 1817 to £1084. 2s.—£6352:18:4.' My Lords, I should have liked very much to have been present at this trial. I have often seen my worthy friend the First Lord Commissioner exceedingly puzzled when I had the honour of arguing questions with him at the Bar of this House. I have often puzzled him, and he has often puzzled me; but I think he must have been more puzzled when this case came before him than ever he was in his life before. How he could get on with such issues as these, I cannot conceive; it does appear to me to be one of the most distressing cases possible. My Lords, the Jury, however, found that the damages were £2000 sterling.

Then there was a motion for a new trial, and, upon this motion for a new trial, the Court of Session were pleased to be of opinion that too little damages had been given. They do not grant a new trial on grounds very common with us, namely excess of damages; but they

do not think the damages enough, and they desire that on the new trial the Jury will distinguish between the damages they will give upon the first ground,—namely, the being dismissed from the office of Collector of Excise, in consequence of the unfounded and groundless complaints of the defenders,—and the damage he sustained, independent of the pecuniary loss arising from his dismissal from the office. Then the Jury say, that in respect of the matter of the issue proven before them, they find for the pursuer on the first issue £1800, and on the second issue £200; the two constituting together this same sum of £2000 sterling. It is taken for granted, therefore, that he was dismissed from office for the causes charged; and they say he shall have £1800 for that. But what are we to do, if we shall be of opinion that the antecedent judgment of the Court of Session, that they were all jointly and severally liable for those damages, cannot be supported? Are we to affect those parties with the £1800 who were no parties to the transaction, or, if they were parties to the transaction, stated causes that were not maliciously stated, or which appear not to be the cause for which he was dismissed? He might have grounds of complaint, as my Lord President justly puts it, not because he was dismissed upon those grounds from his office, but that those charges of misconduct were improperly repeated, or that those charges ought not to have been made, and therefore might have been the ground of an action; but the damages are given, not upon these distinct and separate grounds, but on account of his dismissal from office. Then, if he was dismissed from office for the causes which have been stated, or if he was dismissed from office for the cause which they have stated, and that cause, in the judgment of the Commissioners of the Treasury, good ground of dismissal from his office, it is hard to say, that if a person makes a complaint to the Lords of the Treasury of a circumstance in an officer's conduct, in respect of which they feel it their duty to the public to dismiss him, the persons making the representation are to be answerable for the whole consequences of his dismissal. My Lords, it is impossible to sustain that. July 8. 1822.

With respect to the division of the damages, I have seen a circumstance of this kind, where a Jury has been told, on a new trial being granted, that they must find damages upon both issues; and that is very easily arranged. They say, we gave £2000 damages—that is what we meant; and if it is necessary to divide that, we will give £1800 upon the first issue, and £200 upon the second, and that will set the matter right.

My Lords, I will not enter now upon a number of points that arise in this cause,—namely, whether the principles on which it has been found that persons making complaints in Courts of Justice, which they cannot sustain, are therefore to be held to be liable in damages, and whether those principles will apply to complaints against public officers in respect of their conduct. Without entering into that, and keeping in view, certainly, that in the trial of such an action as this, whether those principles do or do not apply, you must not only make out that the charge

July 8. 1822. was malicious, but that you must make out that it was without probable cause; and your Lordships know that it has been decided over and over again, that if a man's malice is as foul and black as it can be represented, but yet if he has probable cause for the complaint, he cannot be liable to any action for a malicious prosecution; and on the one hand, if it has been found that he has no probable cause of complaint, but if his mind is devoid of malice, neither can an action be maintained; and therefore the question here first to be considered is, Were there both malice and want of probable cause? Why, my Lords, with respect to what has been said here as to politics, there is a distinction taken as to the motives of Mr. Leven, who appears to be (and I ought to state this, that, as far as I can judge, he appears to have been) a very respectable man. The first question here will be, whether the distinction—I mean with reference to the conduct, which, your Lordships observe, the Commissioners of Excise and the Lords of the Treasury always declared, though they did not make it the ground of dismissal from office, they highly disapproved—the distinction between intermeddling in the local and municipal politics of the burgh, and intermeddling with a view to election purposes. If I knew that the Lords Commissioners of the Treasury and the Commissioners of Excise had prohibited Excise officers from intermeddling in the local and municipal politics of a burgh, and I complain of his having done so, I think it would be very difficult to say that I made that complaint without proper cause, unless it was malicious; and certainly I am not to be affected, because such a distinction as that is afterwards taken. It is impossible for me to know his motive, otherwise than by his conduct. I can judge of the intention of the party only from that which I see him doing; and if I see him doing that which would be the very thing which he would be doing, if he intended to have an influence in the elections of the burgh, I may very well conclude that that is his object.

With respect to the charge of taking interest, that charge is made out; but it is the charge assigned as one ground for his dismissal, and as a sufficient ground for his dismissal, inserted in the letter written by Mr. Pearson. Then, if he is dismissed for that reason, how is it possible to say that there was malice in making that charge, or that there was no probable cause? To take the other charge as to the double payments:—If you are to say that William Young and John Young made that charge maliciously; or if you please to put it so, that they made it both maliciously and without probable cause; is it possible to say that Pitcairn is a party to that charge, knowing it to be both malicious and without probable cause? If, because it has been demonstrated that there was not double payment—if, because reasoning upon the proof which at length made out that fact, we are to take it for granted that William and John Young, who had to do with the account, knew from the beginning to the end that that was the fact, still how can we say that George Young and Pitcairn are liable in damages for that trans-

action? It appeared in the result that that transaction could be cleared up as between William and John Young and Mr. Leven. Take it, if you please even so to take it, that William and John Young knew it could be so cleared up, the moment these complicated papers were looked into, and the result of them was known, still I say George Young and Pitcairn are not affected by that. July 8. 1822.

Again, my Lords, I wish to know upon what possible ground it could be stated to the Jury, that the advertisement was one cause they were to look at as a cause of damages, and to look at that advertisement as connected with his dismissal from office, which had taken place some years before. Some years had elapsed between his dismissal from office and that advertisement, without the slightest mention of any circumstance occurring in those years in which Pitcairn was a party; and yet Pitcairn is made jointly and severally liable for that transaction, as a transaction expressly stated to the Jury, as that for which he was jointly and severally liable.

Then, my Lords, according to our notions of proceedings, supposing there had been a trial in this country, and the Jury found them all jointly and severally liable, and the Court, at the trial, had been of opinion that they were jointly and severally liable, but, on a motion for a new trial, the Court had been of opinion that they were not all jointly and severally liable, though the Court might have conjectured that the Jury would have done right if it had given those damages against one or more of them, even to the amount of the very damages given, there must have been a new proceeding; because the Court never could have said that those damages were given for one of those causes, and not for all of those causes—that those damages were given, because one is answerable for them, and not because all are answerable for them; for it was for the Jury to determine which of them was liable, and when it was found out which of them was liable, to consider the damages they would give against whoever was liable, regard being had to the fact, that those individuals only were so liable. My Lords, I am not saying that Mr. Leven may not have a good cause of action; I neither affirm that he has, nor deny that he has cause of action against these individuals, or some of them. I have gone the length of saying, that he appears to me to have been a very respectable man; it is not for me to say (for the matter is not before me) whether he was or has not been ill used; but the question is, whether, for that ill usage, (if it has taken place,) this liability, joint and several, of all these persons can be sustained? My Lords, I am very clearly of opinion that it would be going too far to support that proposition—that it is impossible to determine it in the affirmative,—and therefore I feel it my duty to state, (taking a few hours to consider in what way this judgment is to be pronounced,) that it is impossible to support this proceeding of the Court of Session. If Mr. Leven has received an injury, I am sorry he should not have his remedy; but I do think that such a proceeding as this cannot receive your Lord-

July 8. 1822. ships' sanction. I move your Lordships that this be taken into your Lordships' further consideration on Monday next.

Lord Chancellor.—My Lords, it will be in your Lordships' recollection, that on a former day I endeavoured to explain the grounds on which it appeared to me that the judgment in Young *v.* Leven was not to be maintained. There are a great many questions arising in that cause, which, in the view I have taken, and which I have humbly submitted to your Lordships, it appears to me not necessary to go into. One would be, whether there was proof of malice and of want of probable cause. Another would be, whether the principle which requires that there should be both malice and the want of probable cause, which is applicable in cases in Courts of Justice, should or should not be applied in such inquiries as were made by the Treasury on the complaint in that case. Another question of very great importance would be with respect to the demands that individuals may have upon public Boards to produce their papers. A fourth question might be, whether the Court of Session were right or wrong in granting the production to Mr. Leven, and upon the grounds they state in their interlocutor refusing to compel production on the part of the defenders. But the grounds upon which I apprehend it is clear that the judgment of the Court of Session cannot be supported is this, that neither of the summonses (for there are two, the original summons and the supplementary summons,) alleged sufficiently the words to be the words of all to support the judgment, nor the evidence proved the words to be the words of all, so as to support the judgment.

In the view that I take of the case, I conceive that it will be sufficient that your Lordships should find, 'that none of the acts alleged by 'the respondent in his first and supplementary writs of summons of da-'mages to have been done by all, or some, or one of the appellants, the 'defenders in such actions, are so alleged or proven as to justify the 'finding that the first, second, and fourth articles of the principal and 'supplementary libels are relevant and proven, and that the whole de-'fenders in both actions are conjunctly and severally liable to the pur-'suer in damages;' and therefore, that being a finding in the interlocutor, I think, of the month of February 1817, which must be the basis of all the subsequent proceedings, I should propose to your Lordships to find, 'that the proceedings in the said actions are founded in error, 'and ought to be reversed, and on this ground to order and adjudge 'that all the interlocutors complained of in the said appeal be reversed, 'and that the appellants, the defenders in such actions, be assoilzied 'in such actions,' and that we do not mean to decide upon the other grounds on which the appeal has been brought to the House; and, with a view of avoiding misapprehension hereafter, to add, 'their Lordships 'not meaning thereby to determine any question with respect to any 'particular ground of appeal alleged by the appellants, as applicable 'to any of the several interlocutors complained of,' but reversing the whole proceedings upon the ground thus stated.

Appellants' Authorities.—(1.)—4. Ersk. 4. 80; 2. Fount. 477; Warren. Nov. 19. 1771, (13933); 2. Esp. p. 10; 1. Sand. 131; 3. Esp. 33; Buller's N. P. p. 14; 1. Camp. 206. July 8. 1822.

Respondent's Authority.—(1.)—Thomson, May 16. 1810, (F. C.)

J. CAMPBELL,—SPOTTISWOODE and ROBERTSON,—Solicitors.

(*Ap. Ca. No.* 28.)

PATRICK CRAWFORD BRUCE, Esq. Appellant.—*Moncreiff—Skene.* No. 40.

JOHN NORMAN M'LEOD, Esq. and NORMAN M'LEOD, Respondents.—*Jeffrey—Fullerton—Mackenzie—Robertson.*

Landlord and Tenant—Singular Successor—Sale—Relief.—Held,—1.—(reversing the judgment of the Court of Session,)—That a singular successor or purchaser of an estate is not liable to implement in favour of a tenant an obligation for payment of meliorations granted by the former proprietor, not contained in his tack or title of possession, but that the obligation is effectual only against the former proprietor; and,—2.—(affirming the judgment,) That there existed circumstances in this case sufficient to constitute in favour of the former proprietor a right of relief against the singular successor.

July 8. 1822.

1ST DIVISION. Lord Pitmilly.

THE estate of Glenelg in the county of Inverness, belonging to the respondent John Norman M'Leod, Esq. having been advertised for sale, Mr. Duncan, W. S. the agent of the appellant Mr. Bruce, addressed to Mr. M'Donald Buchanan, W. S. the agent of Mr. M'Leod, a letter, on the 22d of November 1810, stating, that 'I am now authorized by a client who is very desirous to purchase the estate of Glenelg, to offer £97,500 sterling for that property, bearing interest from Martinmas last.' Mr. Buchanan having demanded £100,000, it was agreed to split the difference, and that the offer should be increased to £98,750, subject to the approval of the parties. Accordingly, on the 3d of December, Mr. Buchanan wrote to Mr. Duncan, that 'I communicated your offer, dated the 22d ult. of £97,500 for the 'estate of Glenelg, to M'Leod, and I have this day received his 'answer, authorizing me to close with your offer, with the addition which I mentioned to you verbally, and to which you 'agreed, of £1250, being half the difference between your offer 'and the price required by M'Leod.' He also stated, that 'it is 'not unusual, for the encouragement of the tenants in building 'proper steadings and making enclosures, to allow them the value of such, as the same shall be estimated at their removal. As 'the benefit of any such stipulations must now be derived by the 'purchaser, it is understood that he is to relieve M'Leod of all

July 8. 1822. 'such claims for meliorations to tenants, and to which they may 'be entitled at their removal.' On the following day, Mr. Duncan wrote to Mr. Buchanan, that, 'pretty late last night, I was 'favoured with your letter, stating a good deal of the substance 'of our conversation in the forenoon, and I should be very sorry 'if any thing should occur to prevent our treaty respecting the 'sale and purchase of Glenelg from being brought to the desired 'conclusion; but, as your letter contains two stipulations never 'mentioned to me before,—one, that the purchaser shall relieve 'M'Leod of all claims by tenants for loss sustained by enclosing 'the woods,—the other, to relieve M'Leod of all claims by tenants 'for meliorations on their houses,—let me beg you will give me 'some idea of what these claims may amount to, for you will 'allow they are quite indefinite as to their extent. My client 'lives at some distance, and you will allow me to impart to him 'what you have written and are to write on this subject, and time 'to receive his answer, which I shall press to have without delay.' On the same day, Mr. Buchanan returned an answer, stating, that 'as to claims by tenants for meliorations, I believe that 'would have at any rate attached to the purchaser, as forming 'part of a contract of lease. With very few exceptions, I be-'lieve that, by the whole leases upon the estate of Glenelg, the 'houses and fences are handed over from the one tenant to the 'other, and the incoming tenant pays the outgoing tenant any 'improvement that shall have been made. By the lease of Arnis-'dale, indeed, the rent of which is £800 per annum, the tenant 'was permitted to lay out in meliorations a sum not exceeding '£500, but I do not believe he has laid out one shilling; but I 'consider whatever is laid out in this manner to be much for the 'benefit of the proprietor, and the easiest manner in which such 'meliorations can be done, as the incoming tenant is always happy 'to pay for a good steading. Your friend will see from this ex-'planation that he need not be much alarmed as to these stipula-'tions, which I thought it best now to bring under your view, to 'prevent any future discussion.' On the 13th of December Mr. Duncan communicated to Mr. Buchanan, that 'I have received 'answers from my client to both your letters of the 3d and 4th 'current, in which he agrees to purchase the estate of Glenelg 'on the terms thereof, with this explanation, that if you or 'the Laird of M'Leod shall purchase from Government the 'old barrack and barrack-ground on that estate, which you 'have now in view, that purchase shall be made over to him in 'the same terms on which you make it. I consider this, there-'fore, as a concluded bargain, and request that you will be

'pleased to send me the title-deeds, tacks, searches, &c. of and 'relating to this estate, with your first conveniency.' Mr. Buchanan accordingly, on the 18th, sent the title-deeds with the leases, and, among others, that of the farm of Islandrioch, which had been let to the other respondent Norman M'Leod, the factor on the estate. By a clause in that lease it was stipulated, that in 'regard the said Norman M'Leod has now a dwelling-house on 'the said farm of Islandrioch, it is hereby declared that said 'dwelling-house shall, at the expiry of this lease, be comprised by 'the ordinary birleymen of the barony, or by two or more per-'sons to be named by the parties; and whatever the value shall 'turn out to be on said appreciation, he the said Norman M'Leod 'shall be allowed and paid the same by the said Colonel Norman 'M'Leod as a melioration, not exceeding £200 sterling, if the 'house shall be worth that sum; but, supposing it should exceed 'that sum in value, he the said Norman M'Leod shall not receive 'more than £200 sterling: And farther, in case the said Nor-'man M'Leod shall, during the currency of this lease, build 'good and sufficient stone dikes on the said farm, and leave 'them in a sufficient and fencible condition at his removal from 'the lands, it is also declared that said dikes shall be in like 'manner comprised, and whatever the value shall turn out to be 'on the said appreciation, he shall be paid the same by the said 'Colonel Norman M'Leod, not exceeding £150 sterling, if the 'dikes shall be worth that sum; but although they should ex-'ceed that sum in value, he the said Norman M'Leod shall not 'be entitled to receive more than £150 sterling; and it is here-'by understood and agreed that no other meliorations than those 'above mentioned are to be allowed to the tenant, either on pre-'tence of improvements on the said farm, or otherwise.' This lease, which had been granted in 1795, was to expire in 1814; and the tenant having in the mean while erected additional houses, the landlord Mr. M'Leod, in the month of August 1810, addressed a letter to him, stating that 'I agree to allow you meliora-'tions to the amount of the value of those houses now erected, 'and £100 sterling additional for a new byre to be built on the 'farm of Islandrioch, if the same shall be of that value.'

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In transmitting the leases to Mr. Duncan, Mr. Buchanan mentioned to him, that 'the factor's house (that is, the tenant of 'Islandrioch) being a comfortable one, and where the laird ge-'nerally resides, as by his lease he was limited to the sum of '£200, M'Leod, by a missive of which I have no copy, extend-'ed the meliorations to the actual value of the house at his re-'moval.'

July 8. 1822. Subsequent to this communication, the disposition conveying the property to Mr. Bruce was executed, on the narrative that it had been agreed to 'in consequence of a treaty and correspond-'ence carried on between' the above gentlemen; and there were excepted from the warrandice 'the current tacks, minutes or mis-'sives of tack of the said lands and others, for all the years 'thereof.'

In the month of March 1811, and about two months after the execution of the disposition, the above missive or letter was sent to Mr. Duncan. In November 1812, Mr. Duncan having learned that the claim for meliorations would extend to upwards of £1600, wrote to Mr. Buchanan that he did not consider that, according to the terms of their bargain, this burden was to be sustained by Mr. Bruce. Mr. Buchanan, on the other hand, contended that he had expressly stipulated that Mr. Bruce was to be liable for all claims for meliorations, and that he had made him aware of the existence of the missive before the execution of the disposition.

On the expiration of the tack, M'Leod the tenant obtained a valuation of the meliorations, which were found to amount to £1377: 10: 8, for payment of which he raised an action before the Sheriff of Inverness, both against Mr. Bruce and Mr. M'Leod, libelling on his tack and the above missive. The Sheriff-substitute decerned against them, but the Sheriff-depute altered, and found, 'that the disposition of the barony of Glenelg by the de-'fender Mr. M'Leod in favour of the other defender Mr. Bruce 'is granted with the burden of the current tacks, minutes or mis-'sives of tack of the said barony, and that Mr. Bruce is bound 'to relieve M'Leod of tenants' claims for meliorations, as stipu-'lated by such tacks, minutes or missives of tack: That by the 'lease of Islandrioch in the pursuer's favour, now produced, he is 'entitled to meliorations for the dwelling-house on that farm to 'the extent of £200 sterling, and no more, and that the defender 'Mr. Bruce is liable to him in payment of that sum, with the in-'terest thereof from Whitsunday 1814, as libelled, and decerned 'against him accordingly; but found that the letter or missive 'libelled on, granted by the defender Mr. M'Leod in favour of 'the pursuer, is not obligatory on the other defender, Mr. Bruce, 'as a singular successor in the lands libelled; nor does it fall under 'the exception from the warrandice of the disposition in his fa-'vour, and that therefore he is not liable in payment of the me-'liorations libelled, other than to the extent of £200 sterling, 'with interest as libelled; and found the other defender, Mr. 'M'Leod, liable to the pursuer in payment of the balance of the

'meliorations claimed, amounting to £1377 : 10 : 8 sterling, with 'interest as libelled, and decerned against him accordingly.' Mr. M'Leod having complained of this judgment by advocation, and brought an action of relief against Mr. Bruce, he contended,— July 8. 1822.

1. That by law a singular successor is liable in all the burdens created by the tacks or relative missives in favour of the tenants, and that the obligation in question formed a proper accessory to the lease in favour of the tenant M'Leod, and was binding on Mr. Bruce as the purchaser of the lands, independent altogether of any special stipulation; and,—

2. That at all events Mr. Bruce was bound to relieve Mr. M'Leod of the claim by the tenant, because it had been expressly stipulated in Mr. Buchanan's letter of the 4th of December that Mr. Bruce was 'to relieve M'Leod of all such claims for melior-'ations to tenants, and to which they may be entitled at their 'removal;' and that he had been specially informed, before the execution of the disposition, that the obligation to the tenant M'Leod 'extended to meliorations to the actual value of the 'house at his removal.' On the part of the tenant it was also maintained, that Mr. Bruce, as purchaser, was bound by law to implement the obligation contained in the missive.

To these pleas Mr. Bruce answered,—

1. That although he was in point of law liable to all the burdens created by the tacks or missives of tack by virtue of which the tenants possessed the lands, yet he was not responsible for any separate obligation not contained in these tacks or title of possession, but which the landlord, during the currency of the lease, had given to the tenant:—that in this case the claim of the tenant for meliorations was by his tack expressly limited to the sum of £200 for the houses, (for which Mr. Bruce admitted that he was liable,) and that, seeing this limitation in the title on which the farm was possessed, Mr. Bruce was not bound to inquire further:—that the missive or letter was not a missive of tack, or in any way part of the title of possession, as was evident from the circumstance that it had been granted only two years prior to the expiration of the lease; and therefore, as a purchaser, he was not liable to the tenant.

2. That although it had been no doubt stipulated that Mr. Bruce was to relieve Mr. M'Leod of all claims for meliorations, yet this was subsequently explained by Mr. Buchanan to extend only to a very small sum, and that no mention whatever was made of the letter in question till after Mr. Duncan had stated that he considered 'this as a concluded bargain,' and therefore it was not competent thereafter to impose upon Mr. Bruce additional burdens.

July 8. 1822. The Lord Ordinary found, 'That the letter of the 3d December 1810 from Mr. M'Donald Buchanan to Mr. Duncan stipulated, that in addition to the price to be paid for the estate of Glenelg, as to the amount of which the parties were agreed, the purchaser should relieve the seller of all claims competent to tenants for meliorations at the end of their leases, assigning as the reason for such stipulation, that the benefit of the meliorations would be derived by the purchaser:—that Mr. Duncan's letter of the 4th of December having required information as to the probable extent or amount of these claims, Mr. M'Donald Buchanan, in his letter dated also on the 4th of December, gave some additional information on the subject, but still was unable to make any pointed or precise reply with regard to the amount of the tenants' claims on account of meliorations:—that in this state of matters, Mr. Duncan, by his letter of 13th December, purchased the estate, on the terms proposed on the 3d and 4th December, from Mr. M'Donald Buchanan, and with express reference thereto, and declared the bargain to be concluded:—that the import of the bargain thus concluded was, in so far as related to the tenants' claims for meliorations, that the purchaser undertook to relieve the seller of these claims, though the extent thereof, or the amount and nature of each of the claims, was still undefined, and left to be afterwards arranged, none of the leases having at that period been sent to Mr. Duncan, or the particular claims of any of the tenants communicated to him:—that the bargain having been thus concluded, Mr. M'Donald Buchanan, along with his letter of the 18th of December, sent some of the leases to Mr. Duncan, accompanied with remarks on such of the claims to meliorations as were contained in the leases, and expressly mentioned in his said letter the pursuer's claim to meliorations to the extent of the actual value of his house at his removal, as constituted by missive from the defender John Norman M'Leod, the seller of the estate:—that no objection to this claim, or any observation thereon, was made in answer to the letter of the 18th December, although the claim was thus distinctly brought under the view of the purchaser and his agent at the same time when the claims to meliorations of the other tenants on the estate were stated, and with reference to the former letters by which the purchaser had undertaken in general terms to relieve the seller of these claims, and it not appearing that any circumstances attending the claim, which were known to Mr. M'Donald Buchanan or his constituent at the time, were unduly withheld from the knowledge of the purchaser:— that, after this correspondence, the disposition was subscribed, and the purchaser entered into possession, and no

'hint was conveyed that he did not hold himself liable to relieve 'the seller of the claim in question, till the 24th of November '1812, when a letter to this effect was written by Mr. Duncan, 'in which it was mentioned that the pursuer's claim is expected 'to amount to between £1600 and £1800 sterling:—that, under 'these circumstances, the defender Patrick Crawford Bruce must 'be held to have undertaken to relieve the other defender of the 'claim in question, and that such is the import of the disposition; 'and that the circumstance of the amount of the tenant's claim 'having been fixed at a fair valuation, at the end of the lease, at 'so large a sum as it turned out to be, cannot affect or alter the 'rights of parties:—therefore, on these grounds, in the action ori- 'ginally pursued at the instance of Norman M'Leod, the late 'tenant, decerned against both defenders, conjunctly and seve- 'rally, in terms of the libel, and found them liable in expenses to 'the pursuer; and in the action of relief at the instance of John 'Norman M'Leod against Patrick Crawford Bruce, repelled the 'defences, decerned in terms of the libel, and found the said 'Patrick Crawford Bruce bound to relieve the said John Nor- 'man M'Leod of the expenses found due to the pursuer of the 'original action, and also found him liable in expenses to the 'pursuer John Norman M'Leod.' To this interlocutor the Court adhered on the 30th of June 1818. * July 8. 1822.

Mr. Bruce having appealed, the LORD CHANCELLOR moved, and the House of Lords found, 'That the appellant was not 'liable, in the action originally pursued at the instance of the re- 'spondent Norman M'Leod, the late tenant of the farm men- 'tioned in the proceedings, in payment of the meliorations libelled, 'other than to the extent of £200 sterling, with interest, as ex- 'pressed in the interlocutor of the Sheriff-depute of the 24th of 'February 1816; and that the letter or missive libelled on, grant- 'ed by the other respondent, John Norman M'Leod, in favour of 'the said Norman M'Leod, was not obligatory on the appellant; 'and that the respondent John Norman M'Leod was alone liable 'to the said Norman M'Leod, the pursuer in the said action, in 'payment of the balance of the meliorations claimed, as found by 'the said interlocutor of the Sheriff-depute; and therefore it is 'ordered and adjudged, that so much of the interlocutors of the 'Court of Session complained of as decerns in the action origi- 'nally pursued at the instance of the said Norman M'Leod, the 'late tenant, against both defenders in such action, conjunctly

* Not reported.

July 8. 1822.

'and severally, in terms of the libel, and finds them liable in expenses to the pursuer in such action, be reversed; but found that, in the action of relief at the instance of John Norman M'Leod, the said appellant was bound to relieve the said John Norman M'Leod from the demands of the said Norman M'Leod, the tenant, under the letter or missive libelled on in the original action; and it is therefore ordered and adjudged, that so much of the interlocutors complained of, as is consistent with these findings, be affirmed; and it is further ordered, that the cause be remitted back to the Court of Session, to do therein as shall be just and consistent with these findings.'

Respondents' Authorities.—(1.)—Arbuthnot, Feb. 1772, (10424); Bells, June 14. 1814, (F. C.); Murray, Jan. 26. 1815, (F. C.)

J. CHALMER,—SPOTTISWOODE and ROBERTSON,—Solicitors.

(*Ap. Ca. No.* 29.)

No. 41.

EDWARD BELL and Others, Representatives of the late ROBERT BELL, Appellants.—*Warren—Courtenay.*

ANDREW WILLISON and JAMES BELL, Respondents.—*Gifford—Macfarlane.*

Society—Process.—It having been stipulated in a contract of copartnery, that in the event of the death, withdrawing, or bankruptcy of a partner, the remaining partners should grant bond for his share of the last annual balance; and one of the partners having died; and thereafter all the remaining partners (with the exception of two) having become bankrupt; and an action having been raised by the representatives of the deceased partner against the two solvent partners; and the Court of Session having sustained the action against them, but assoilzied them on the merits—Held (reversing the judgment) that the claim of the representatives lay not against these two partners alone, but against all the other partners jointly, including those who had become bankrupt, and that these persons ought to have been called as defenders; and a remit made accordingly.

July 8. 1822.

2D DIVISION. Lords Gillies and Bannatyne.

ON the 30th of December 1800, William Bell of Cupar's Bridge, Robert Bell of Chichester, Lord Kinnaird, James Bell junior of Blackheath, James Bell the elder of Arbroath, and Dr. John Willison of Dundee, entered into a contract of copartnership as manufacturers of and dealers in sugar, under the firm of William Bell and Company of Dundee, for the period of twenty-one years. The books were to be balanced annually; and by the 16th article it was provided, that 'in case any or either of the 'said parties shall be desirous of withdrawing from the said co-

'partnership at any time before the expiration thereof by ef- July 8. 1822.
'fluxion of time, then he or they shall signify such his or their
'desire in writing to the others of the said parties; and the said
'party or parties so desirous of withdrawing shall be entitled to
'receive, in manner after mentioned, his share of and in the said
'copartnership concerns, as the same shall appear to be due and
'belonging to him at such yearly settlement to be made as herein
'before mentioned, next immediately following such notice, a
'fair and reasonable allowance being first made thereout for bad
'and dubious debts; and the others of the said parties who shall
'continue in the said copartnership shall give unto such party or
'parties so withdrawing their joint bond in a penalty of double
'the sum which shall so appear to belong to him or them as
'aforesaid, conditioned for the payment of such single sum by
'three equal payments of six, nine, and twelve months, to be com-
'puted from the date of such last-mentioned yearly settlement,
'with lawful interest for the same at and after the rate of £5 per
'centum per annum from such date; and the said party or par-
'ties so withdrawing shall thereupon give and execute unto the
'others of the said parties so continuing, a full release and dis-
'charge of all claims and demands upon the said copartnership;
'and the said parties so continuing shall release and discharge the
'said party or parties so withdrawing of and from, and indemnify
'him and them against all debts, claims, and demands due or to
'be made upon the said copartnership.' By the 17th article it was agreed, that 'in case any or either of the said parties shall 'depart this life before the expiration of the said copartnership 'by effluxion of time, then the same mode of settlement shall be 'adopted between the surviving parties and the executors or ad-'ministrators of the deceased party or parties, and the same mat-'ters and things shall take place, as is herein before mentioned 'and provided for, in the case of any of the said parties with-'drawing from the said copartnership.' It was also provided, 'that in case any or either of the said parties shall become insol-'vent or bankrupt, then the said copartnership, so far as respects 'such party or parties, shall be at an end;' and a settlement was to take place, as in the case of death or withdrawing.

Soon thereafter Lord Kinnaird died. On the 12th of January 1807, Robert Bell also died in England; and a balance was struck on the 21st of that month, when it was ascertained that the share to which he had right was £1540: 9: 7. He left a testament, by which he bequeathed his whole effects to his son James Bell the younger, (one of the partners in the above concern,) and particularly 'all and every my shares and share, interests 'and interest, in the capital stock, business, and concern of the

July 8. 1822. 'Dundee sugar-house, carried on under the firm of William Bell 'and Company in Dundee aforesaid;' but declaring that his estate should be chargeable with certain legacies in favour of the appellants, the other members of his family; and he appointed his son James his sole executor. On the 2d of June 1807, this testament was proved in Doctors Commons by James Bell, to whom letters of administration as executor were granted.

Besides being a partner of the above concern of William Bell and Company, James Bell was also a partner of James Bell and Company, merchants in London, where he resided; and he, as the principal partner of that company, had been in the practice of drawing in the name of that house on William Bell and Company; and in the course of the nine months which immediately followed his father's death, it was alleged that the balance of these drafts exceeded by £1500 the credit which he held on his own account.

In the month of August 1807 James Bell stopped payment, but no commission of bankruptcy was issued against him; and on the 6th of November of that year William Bell (who was the managing partner of William Bell and Company in Dundee, and also brother of James) became bankrupt, and a sequestration was awarded of his estates. The only solvent partners who remained were James Bell the elder, and Dr. Andrew Willison. These two partners, on the 30th of March 1808, dissolved the company, appointed a factor for winding up its affairs, and thereupon brought an action of declarator for having it found, that 'the 'said copartnership, so far as respects the said James and William 'Bell, is at an end; that the pursuers are the only surviving and 'remaining solvent partners of said copartnership, and that the 'same mode of settlement should be adopted between the pur-'suers, the solvent partners, and the trustees or assignees of the 'said James Bell the younger, and William Bell, as is provided 'for in the case of the death of any of the parties.' At the same time, they raised a multiplepoinding for dividing the company funds; and appearance was made for James Bell, both on his own account, and as representing his father Robert Bell. These actions, however, fell asleep; and the present action was thereafter raised by the appellants, libelling on the testament of the late Robert Bell bequeathing to them the several legacies in their favour, and concluding for payment of his share, in terms of the contract, with interest, against the respondent Andrew Willison, as representing Dr. Willison (who was now dead,) and James Bell the elder, as the only 'solvent partners of the said company of 'William Bell and Company, and as such, in terms of the fore-'said contract, liable in payment of the debts of the said company.'

In defence it was pleaded by the respondents,—

1. That the appellants had no title to pursue, as James Bell was nominated executor. July 8. 1823.

2. That by the testament of Robert Bell, his share in the copartnership was specially assigned to James Bell; and that he, having founded upon that testament in the multiplepoinding, had thereby judicially intimated the assignation, so that the share was now vested in him, subject to the burdens created by the will, and therefore James Bell, and not the appellants, was their proper debtor; and,—

3. That such being the case, and as the appellants could only claim through James Bell, and as the respondents would be entitled to set off any claim which they had against that person, and as the debt which he owed to the company was equal to the share which belonged to his father, they were entitled to plead compensation as to that share, so as to extinguish the claim of James Bell.

To this it was answered,—

1. That the testament bequeathing them the legacies formed a sufficient title in their favour.

2. That it could not operate as a special assignation to James Bell, so as to vest in him the share thereby bequeathed, without a confirmation from the Commissaries, which he had not obtained; and the letters of administration which had been granted to him in England, had not the effect to transfer it to, and vest it in him, but only to entitle him to administer the fund; and therefore the appellants, as legatees of the late Robert Bell, were entitled to insist in the action against the respondents as their proper debtors; and,—

3. That the defence of compensation was not relevant, seeing that it was alleged to have arisen, not between William Bell and Company, and James Bell as an individual, but between the former and a separate and third party, viz. James Bell and Company.

Lord Gillies assoilzied the defenders; and the appellants having thereupon represented, Lord Bannatyne (who had come in place of his Lordship as Lord Ordinary) refused a representation, 'in respect that, independent of the question, to what extent the 'defenders, as individual partners of Bell and Company, could be 'personally called to answer to Robert Bell, an individual member 'of that company, or to his representatives, for the supposed 'amount of his share in the hands of the company, that neither the 'company, nor they as partners thereof, to whatever extent they 'might be liable to account for such share to Robert Bell or his 'representatives, can be under any such responsibility to the pur-'suers as special legatees or creditors, further than as they shall, 'as such, have used proper legal means for attaching and establish-

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'ing a right thereto.' The appellants then applied to the Commissaries, and got a license to pursue, and at the same time obtained themselves decerned executors-creditors qua legatees of the late Robert Bell; but they did not expede a confirmation. Having done so, they offered a second representation; on advising which, his Lordship, 'in respect that so far as Bell and Company, and 'the defenders as individual partners thereof, stood indebted to the 'personal estate of the late Robert Bell for the value of his in-'terest as a partner in the company, ascertained in terms of their 'contract of copartnery, the representers (appellants) being cre-'ditors on his estate for the amount of the legacies severally pro-'vided to them by his testamentary settlement, and having pro-'duced a decree-dative decerning them as executors-creditors 'qua legatees, and a license to pursue, altered the interlocutor 'complained of, to the effect of sustaining their title to insist in 'the present action; and further found that the defenders (none 'of whom deny that they continue members of the company) are 'accountable to his estate for the amount of the late Robert Bell's 'interest in the company stock, ascertained by the last year's 'balance, immediately preceding his death; and appointed them 'at next calling to say whether they do or do not admit that 'balance to have stood as in the note produced and founded on 'by the representers; and the representers, so far as that shall be 'disputed, to say in what manner they are prepared to instruct 'the accuracy thereof, or the actual amount of that balance, 'for which they are entitled to claim credit.'—Thereafter, on advising a representation for the respondents, his Lordship reported the case on memorials to the Court; and their Lordships thereupon sustained the defences, and assoilzied the respondents, but found no expenses due. To this interlocutor they adhered on the 26th of January 1819, 'reserving to the petitioners (appel-'lants) to be further heard before the Lord Ordinary upon any 'claim they may be advised to make upon any residue, if such 'be, in the hands of the respondents, and in bonis of the defunct 'Robert Bell, and to the respondents their defences, as accords.'*

Bell and others having appealed, the LORD CHANCELLOR moved, and the House of Lords 'ordered and adjudged, that the inter-'locutors complained of, so far as they sustain the defences, and 'assoilzie the defenders, be reversed; and found that the demand 'of the appellants in the said action, if any they have, is a de-'mand against the representatives of William Bell of Cupar's 'Bridge, and James Bell younger of Blackheath, jointly with the

* Not reported.

'respondents: And it is further ordered, that the appellants be at 'liberty to proceed in the Court of Session, for the purpose of 'bringing before the said Court such parties as may be necessary 'according to this finding; and thereupon, or in case the ap- 'pellants shall not proceed to bring the parties before the Court 'within a reasonable time to be appointed by the said Court, 'then the said Court shall proceed in the said cause, and do 'therein as shall be just.' July 8. 1822.

Respondents' Authorities.—(1.)—3. Stair, 1. 19; 1690, c. 26; Gordon *v.* Campbell, Jan. 1729, (14384); 3. Ersk. 9. 11.

A. MUNDELL,—SPOTTISWOODE and ROBERTSON,—Solicitors.

(*Ap. Ca. No.* 30.)

R. MENZIES, W. S. Appellant.—*Warren—Clerk—Irving.* No. 42.
JOHN EARL of BREADALBANE and HOLLAND, Respondent.—*Jardine—Davidson—Evans.*

Superior and Vassal—Clause.—Held, (affirming the judgment of the Court of Session,) that a clause by which a superior reserved in a feu-contract right to the mines and minerals, did not give him right to a quarry of freestone situated within the lands.

IN the year 1699, King William III., by a charter under the Great Seal, granted to John Marquis of Atholl, (proprietor of extensive estates in Perthshire,) and his son in fee, 'omnes et 'singulas auri fodinas, argentarium metallum, seu fodinas ar- 'genti, molybdinam, seu fodinas plumbi, fodinas stanni, fodinas 'cupri, et alia mineralia, colores et metalla quæcunque, de qui- 'buscunque naturâ, generibus, vel qualitate eadem sunt, hactenus 'inventa, vel quæ ullo tempore in posterum infra totas bondas 'dict. terrarum et comitatûs de Atholl comprehenden. ut in 'infeofamentis earundem, jacen. infra vicecomitatum de Perth, 'et infra bondas omnium aliarum terrarum, dominiorum, baro- 'niarum, aliorumque, sub quâcunque designatione eadem sunt, 'ad eos pertinen. et spectan., tam in superioritate quam in pro- 'prietate, ubicunque eadem jacent. infra dictum regnum invent. 'erunt, cum omni jure, titulo, et interesse quibuscunque quæ 'nos vel nostri successores habemus, vel alio modo habere, cla- 'mare, vel ad easdem, vel ad aliquam partem seu portionem ea- 'rundem, ullo modo pretendere poterimus; cum plena potestate 'prænominato Joanni Marchione de Atholl, et dicto suo filio, 'ejusque antedictis, lucrare, operare, scrutare, et adinvenire 'prædict. fodinas, mineralia, colores, et metalla infra aliquam 'seu quamlibet partem terrarum generaliter et particulariter su- July 17. 1822.
2D DIVISION.
Lord Pitmilly.

July 17. 1822. 'pra mentionat.; et ad hunc effectum defodere, operare, et lu-
'crare descensus, caudas lie shanks, perpendicula lie levels, for-
'mas et arcus lie vaults, et seatinas seu latrinas lie sinks, infra
'fodinas, mineralia, colores, et metalla; ac etiam cum privilegio
'et potestate viarum et transitorum lie passages ad easdem et ab
'lisdem, et generaliter omnes et singulos alios modos et methodos
'requisitos ad easdem operand. et lucrand. seu vincend. agere,
'uti, et exercere, uti præfato Joanni Marchioni de Atholl, ejus-
'que filio suisque præscript. placuerit, et iis expediens videbi-
'tur; et super prædict. fodinis, metallis et aliis, ad libitum uti,
'disponere, et easdem, et omnes commoditates et proficua earun-
'dem, ad eorum proprios usus et utilitatem plenarie et integre
'applicare; et similiter cum potestate præfato Joanni Marchioni
'de Atholl, et dicto suo filio, suisque supra specificat., liquefacere
'seu dissolvere, et excoquere seu concinnare, purgare seu eli-
'mare dict. metalla et mineralia, ad eadem extra mare transpor-
'tare, (exceptis auro et argento, quæ per leges exportari prohi-
'bentur); et generaliter cum omnibus et singulis aliis libertati-
'bus, privilegiis, et immunitatibus quibuscunque pertinentibus,
'vel quæ per leges et praxin prædicti regni gavisæ et possessæ
'fuerunt, vel ad ullas fodinas et opera apud easdem ullo modo
'pertinere aut spectare, dignosci poterint.'

Thereafter, in 1707, the Marquis—now Duke of Atholl—feued the lands of Bolfracks (forming part of the estate of Atholl) to Alexander Menzies by a feu-contract in which there was this reservation: 'Reserving always to the said John Duke of Atholl the 'haill mines and minerals that may be found within the bounds of 'the said lands of Bolfracks, of whatsoever nature or quality, with 'the liberty of digging, winning, and away leading the same; but 'with this provision, that the said John Duke of Atholl and his 'foresaids be obliged to satisfy the feuars and possessors of the said 'lands for the time for what damage shall happen through breaking 'of the ground, and making ways through the lands in searching 'for, winning, and away leading the said mines and minerals.' In these lands there was a quarry of freestone which had been discovered in 1723, and which, it was alleged, was of a singular and uncommon nature, being admirably suited for ornamental architecture, and highly valuable from the circumstance, that this quality is not possessed by any other stone in that district of the country.

The right to the superiority, and to the above reservation, was subsequently acquired by the appellant Mr. Menzies, and the lands were purchased by the respondent, the Earl of Breadalbane. The Earl having commenced to build a mansion-house at Taymouth, and having claimed the exclusive right to this quarry, from which

he extracted stones for the purpose of building, the appellant Mr. Menzies raised an action to have it found that he had the sole and exclusive right to the mines and minerals within the lands, and in particular to the quarry, with the whole stones contained in it, in virtue of the above clause. July 17. 1822.

In defence against this action the Earl maintained, That the clause of reservation by the superior was merely intended to include those mines and minerals that had been conveyed by the charter of 1699, which was confined to metals, and had no reference to stones, or any similar substances: that the term 'mineral' did not embrace stones, and such a construction would have the absurd effect of entitling the superior to every stone on the property.

By Mr. Menzies it was answered, That the object of the charter was merely to convey the mines and metals which belonged to the Sovereign jure coronæ; and as the Marquis of Atholl was (independently of that charter) proprietor of all the other minerals within the lands, he had full power to reserve to himself the stones, &c. within them:—that the words in the reservation comprehended every substance of the nature of the stone in question, although only used for the purpose of building; and that he did not pretend that he had right to every stone within the lands, but only to those of a valuable nature.

The Lord Ordinary found, 'That the reservation contained 'in the original feu-charter of the lands of Bolfracks in 1707 to 'Alexander Menzies, 'of the haill mines and minerals that may "be found within the bounds of the said lands of Bolfracks, of "whatsoever nature and quality, with the liberty of digging, "winning, and away leading the same,' being expressed in the 'broad and comprehensive terms above recited, without any ex-'ception under which the quarry in question might have been 'understood to have been included, and with the single provision 'that the superior should satisfy the feuar or possessors for the 'surface damages occasioned in searching for, winning, or leading 'away the mines and minerals, must be held to have compre-'hended the quarry or mine in question, with the stone thereof, 'and the liberty of digging, winning, and away leading the same, 'on paying surface damages; and on these grounds decerned in 'terms of the declaratory conclusions of the libel, and appointed 'the pursuer to state in a condescendence the amount of the da-'mages claimed by him.'

Against this interlocutor the Earl of Breadalbane having reclaimed, the Court altered, sustained the defences, and assoil-

July 17. 1822. zied him from the conclusions of the libel; and to this interlocutor they adhered on the 10th of June 1818. *

Mr. Menzies having appealed, the House of Lords 'ordered and adjudged, that the interlocutors complained of be affirmed.'

LORD CHANCELLOR.—My Lords, there is a cause of Menzies and the Earl of Breadalbane, which involves the question as what was meant by a reservation of all mines and minerals of whatsoever nature or quality; and the question is, Whether, under the words 'mines and minerals,' there is included a reservation of quarries of stone? That reservation is not contained in a lease, but in a feu; and I take it, there is a very great difference as to the principles that are to be applied to the construction of a feu and a lease—it is a question of a very different nature. In the case of a lease, the object is to give the benefit of the enjoyment of the surface to the lessee. Unless you reserve specially, every thing is supposed to be let that can be actually enjoyed,—every thing that the lessor or lessee can enjoy; but, taking it that the lessee cannot work the mines, minerals, stone quarries, and so on,—which he cannot do, for that would be accounted waste,—still, if a power to work them is not reserved in the lease, the lessor cannot enter and enjoy without the lessee's permission: that is the principle we act upon. On the other hand, in the case of a feu, every thing is given that is not specially reserved. It does appear to me to be the better opinion, that mines and minerals in this feu did not mean stone quarries, and that the opinion of the majority of the Judges is therefore right; the consequence of which will be, that the judgment should be affirmed.

SPOTTISWOODE and ROBERTSON,—J. CHALMER,—Solicitors.

(*Ap. Ca. No.* 31.)

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* See Fac. Coll. 10th June 1818, No. 169, where it is said, that 'upon advising 'a reclaiming petition for the defender, with answers, three of the Judges were of 'opinion that the stone in question was not such a substance as fell within the reservation; the remaining Judge was of opinion that the terms of the reservation 'were so broad as to comprehend it. Upon advising a reclaiming petition for the 'pursuer, with answers, four of the Judges thought the interlocutor of the Court 'right; the remaining Judge still doubted of it.'

EARL and Others, Commissioners of the Board of Customs for Scotland, Appellants.—*Shepherd—Gifford—Maconochie.* DAVID VASS, Respondent.

No. 43.

Public Officer.—Held, ex parte, (reversing the judgment of the Court of Session,) that public officers are not entitled or compellable to produce written communications made to them officially relative to the character and conduct of a party applying for a public office, the productions being demanded with a view to an action of damages against the writer.

July 17. 1822.

2D DIVISION. Lords Craigie and Reston.

VASS, who was formerly a paymaster in the Berwickshire regiment of North British militia, raised an action before the Court of Session against the Earl of Home, the Colonel of the regiment, stating, that having been about to be appointed to the office of Comptroller of Customs at the port of Grangemouth in Scotland, the Earl had, in answer to a letter from the Collector of Customs at that port, insinuated that he had been obliged to leave the regiment, which insinuation had given rise to a correspondence with the Board of Custom sand the Lords of the Treasury with the Earl, who had in the course of it made various malicious, false, and calumnious statements against him, in consequence of which he was deprived of the office of Comptroller; and therefore concluding for damages.* The Lord Ordinary ordered Vass to give in a condescendence of his averments, and answers to be lodged by the Earl of Home; on advising which, he ordained 'the pursuer to confess or deny, by a writing under his hand, the 'statements contained in the answers to the condescendence;' and granted to him a diligence for recovery of the writings founded on by him in the condescendence. That correspondence consisted chiefly of the letters which had been written by the Earl of Home to the Commissioners of Customs, and to the Lords of the Treasury, in consequence of a requisition by them to that effect. In virtue of this diligence, Vass summoned the Commissioners of Customs and their Secretary 'to bring with them, exhibit and 'produce the writings founded on by the pursuer in his conde-'scendence, or such of them as they have in their hands, custody 'or keeping, and to depone thereupon as in an exhibition.' The Commissioners gave in a minute, objecting that they were neither bound nor entitled to produce the papers called for, as they had come into their hands on behalf of the public, and in the course of an investigation as to the fitness of Vass to hold an official and

* The summons is fully recited in the opinion delivered by the Lord Chancellor. See postea, p. 231.

July 17. 1822. confidential situation. The Lord Ordinary, on considering this minute, with answers by Vass, repelled the objection, 'in respect 'that the Commissioners are cited merely as havers of the com-'munications made to them by the Earl of Home, and of the 'case, 8th March 1814, Leven *v.* the Board of Excise.' To this interlocutor the Court adhered on the 20th of February 1818.*

The Commissioners of Customs having appealed, and no Case being lodged on behalf of Vass, the House of Lords 'ordered 'and adjudged that the interlocutors complained of be reversed.'

Eldon

LORD CHANCELLOR.—My Lords, this is a case brought before your Lordships upon appeal by the Commissioners of the Board of Customs in Scotland, which gives rise to the question, whether the appellants can be compelled to produce in evidence in a Court of Law, in an action depending between third parties, and in which they have no interest, officially or otherwise, the documents coming to their hands in the discharge of their official duty, and remaining in their custody? This question, so stated, arose incidentally in the course of the proceedings.

My Lords, in the paper I have in my hand, it is taken for granted by those who insist that the Commissioners of Customs ought to produce these papers, that the Commissioners of the Customs might, if they were influenced by caprice, produce the papers; and therefore it is argued, if it is competent for them to produce them, they ought to be compellable to produce them. I apprehend, in all the cases in which it has been held, upon the principles of public policy, that you shall not be compellable to give evidence of, or produce such instruments,—that is, wherever it is held you are not, on grounds of public policy, to produce them,—you *cannot* produce them, and that it is the duty of the Judge to say, you *shall not* produce them. This question is not, whether they can be permitted to produce them, but whether they can be compelled to produce them.

I preface what I am going to state by saying, that I do not mean

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* See Fac. Coll. 20th February 1818, No. 155, where it is stated, that 'three of 'the Judges expressed an opinion that the Board were bound to produce the letters 'called for, being from a third party to the Board, and their contents being conde-'scended on, although the case might have been otherwise with regard to official 'communications between the Board and their own officers employed in making in-'quiries, or between the Board and the Treasury. Their Lordships did not see why 'the Board should not be bound to produce their information, as the Lord Advo-'cate is. The remaining two Judges were of opinion, that the compelling the pro-'duction of such letters would deprive the Board of the power of procuring inform-'ation, and that it would be unjust to the opposite party, as all that could be ob-'tained was only a partial production of evidence, it being admitted that the Board 'were not bound to disclose their deliberations and proceedings upon the informa-'tion obtained by them, so that it could not appear to what extent the informa-'tion had operated.'

to enter into the question, how far the representations in the answers to the condescendence are or are not true; but I take the answers to the condescendence as stating a case which may be proved, for the express purpose of illustrating the mischief which would arise from the producing them on the grounds of public policy. In the first place, it will be necessary to read to your Lordships the summons. The summons states, 'That in the month of May last the pursuer was no-'minated, by the Lords of His Majesty's Treasury, Comptroller of the 'Customs at the port of Grangemouth in Scotland, and his nomination 'having been transmitted to the Honourable Board of Customs in Scot-'land, they ordered their Secretary to write to John Muirhead, Collector 'of Customs at Grangemouth, requesting to know if the pursuer resided 'at or near that port, or if the said John Muirhead, Collector, knew 'where the pursuer was to be found: That the said John Muirhead, Col-'lector, being in the knowledge that the pursuer had formerly held the 'office of paymaster to the Berwickshire militia, wrote a letter to the 'Right Honourable Alexander Earl of Home, requesting to be informed 'where the pursuer was to be found: That the said Alexander Earl of 'Home, in returning an answer to said letter,' (your Lordships observe that this is not a part of the correspondence with the Secretary of the Board, but a letter from Lord Home,) 'did not confine himself to an in-'timation of his ignorance of the pursuer's place of abode, but, on the 'contrary, made a gratuitous and uncalled for assertion, that he neither 'knew nor had heard any thing of the pursuer since he was obliged to 'leave his the said Alexander Earl of Home's regiment.' Then he says, '—evidently with the malicious purpose and intention of ruining the pur-'suer's character, and preventing him from obtaining the office to which 'he had been nominated:' (That, I take it, is an assertion, that it is evident from the Earl of Home's answer that he had a malicious purpose and intention of ruining his character; but how it can be evident that he had a malicious purpose and intention of ruining his character, when he merely says he had heard nothing of him since he had left his regiment, without saying for what cause,—whether from illness or otherwise, stating it simply as a fact,—I cannot conceive:) 'That this letter having been transmitted 'by the Collector to the Board of Customs, they instructed their Secre-'tary to require the pursuer to produce certificates to them of the manner 'in which he had discharged the duties of his former office of paymaster 'to the Berwickshire regiment of militia: That the pursuer thereupon ap-'plied to the Earl of Home, and the other officers of the regiment, for such 'certificates: That the Earl of Home, and all the other officers who were 'required so to do, granted accordingly' certain certificates of his good behaviour as paymaster of the regiment,—(It was not on account of any misbehaviour as paymaster of that regiment that he quitted it; but we shall see by and by from the answer to the condescendence why he was obliged to leave the regiment.)—'That although these certificates were produced 'to the Honourable Board of Customs, yet, in consequence of the imputa-'tion against the pursuer's character conveyed by the said Alexander

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July 17. 1822. 'Earl of Home in the letter above mentioned,'—(that is, the letter which 'states that he neither knew nor had heard any thing of the pursuer since 'he was obliged to leave his regiment, which is supposed to show *evidently* a malicious purpose,)—'they informed the pursuer, by their Secretary, 'that they could not admit him to the office to which he had been nomi-'nated as aforesaid, until he procured from the Earl of Home, and pro-'duced to them, a satisfactory explanation of the expression in his the 'said Alexander Earl of Home's letter to the Collector of Grangemouth, 'before mentioned: That the pursuer thereupon more than once applied 'to the Earl of Home for an explanation of the expression in the letter, 'which he refused to give.' Your Lordships will see by and by why he refused to do it. 'The pursuer thereafter submitted his case in a memo-'rial to the Honourable Board of Customs, in which he detailed the cause 'which led to his resignation as paymaster of the Berwickshire militia, 'and also stated a reason'—(not saying in his summons what that reason was)—'accounting for the silence or refusal of the Earl of Home to ex-'plain the expression used by him as above stated: That upon consider-'ing this memorial, and accompanying certificates of character from the 'officers of the regiment, the Honourable Board of Customs expressed an 'opinion, by their Secretary, that they could not interfere in the matter 'of the pursuer's appointment, and suggested the propriety of the pur-'suer's stating his case to the Lords of the Treasury.' Your Lordships will see hereafter that the Earl of Home's reason for not giving an explanation of that expression was, that, in the discharge of his duty as a military officer, he had been in communication with the Secretary at War, and it was in consequence of those confidential communications that the circumstances passed, which your Lordships will hear presently. That, upon considering the pursuer's own memorial, and the accompanying certificates of the officers of the regiment, the Board of Customs expressed the opinion I have just mentioned. 'That the pursuer accordingly did 'state his case to the Lords of the Treasury in a memorial to the same 'purport as that laid before the Honourable Board of Customs, upon con-'sidering which, their Lordships, by their Secretary, expressed an opi-'nion that they could not interfere with the Board of Customs in Scot-'land, and referred the pursuer to them for a decision on his case: That 'the pursuer did therefore again submit his case to the Board of Customs, 'by laying before them the memorial which had been submitted to the 'Lords of the Treasury, together with the certificates of character before 'mentioned, when the Board requested the pursuer to produce a certifi-'cate of character from Sir George Warrander, Bart. Lieutenant-Colonel 'of the Berwickshire militia, which was also laid before them: That the 'Board of Customs having seen the pursuer's character so amply certified, 'were at a loss to discover the reason or meaning of the insinuation 'against him contained in the letter of the Earl of Home to the Collector 'at Grangemouth, before mentioned; and therefore they sent the said 'memorial to the Lords of the Treasury, and relative certificates to the 'Earl of Home, for the purpose, as is *supposed*,'—(no ground is stated

for the supposition,)—'of obtaining from him an explanation of the ex- July 17. 1822.
'pression already mentioned, who thereupon wrote and sent a letter to
'the Board containing statements against the memorialist's character,'—
(this is all conjecture; he does not state one word or reason for these state-
ments,)—'which induced them to come to the resolution not to admit the
'pursuer into the office of Comptroller of the Customs at Grangemouth,
'and to report so to the Lords of the Treasury: That, in consequence of
'the gratuitous assertion contained in the letter by the Earl of Home to
'the Collector of Customs at Grangemouth, first above mentioned,'—(the
contents of which letter are by no means either libellous or scandalous,)—
'of his refusal to give any true and satisfactory explanation of the same,
'although frequently required so to do;' and in consequence of these ca-
lumnious statements, he says that all this was done with an intention to
deprive him of the office to which he had been nominated, and that he has
been prevented being admitted to the same.

There were short defences put in to this summons, and then the Court of Session did (as well they might) call upon this party to condescend upon what he had complained of, and accordingly the condescendence is in these terms:—'That the pursuer, in the month of May 1815, received
'the usual official notice, that he had been nominated by the Lords of
'the Treasury to be Comptroller of the Customs at Grangemouth, in the
'room of Mr. Thomas Learmonth resigned, and he was at the same time
'informed that he must repair to Leith for instruction in the duties of
'his office. All this is instructed by a letter from Messrs. Muirhead and
'Burns, two of the officers of the Customs at Grangemouth, dated the
'10th of May 1815, produced in process. Mr. Muirhead, the Collector
'of the Customs at that port, having written to Lord Home, (of whose
'regiment the pursuer had formerly been paymaster,) inquiring where
'the pursuer resided, the defender was pleased, in answer to this, to state
'that the pursuer had been obliged to leave the regiment. This state-
'ment was utterly untrue; for, though the pursuer had voluntarily resigned
'his situation of paymaster a few weeks before the regiment was disem-
'bodied, yet in fact he continued to act in that capacity, and never left
'the regiment at all while it remained embodied. The Collector having
'transmitted Lord Home's letter to the Board of Customs, the pursuer
'was required to explain the cause of his being obliged to leave the regi-
'ment. He applied to Lord Home for an explanation of this unguarded
'expression, which his Lordship refused to give; and, on the contrary, by
'additional representations and misstatements, written and verbal, regard-
'ing the pursuer, his Lordship succeeded in depriving him of his ap-
'pointment. The pursuer will prove that the various statements and re-
'presentations made by Lord Home to the Board of Customs, or to their
'officers, were untrue; and that it was in consequence of these statements
'and misrepresentations that he lost his appointment. In consequence
'of these statements and misrepresentations, a report was made by the
'Board of Customs to the Lords of the Treasury, stating that the me-
'morialist was an unfit and improper person for the appointment, and

July 17. 1822. ' in consequence the pursuer has not been installed into the office.' Then he states the annual salary, and the amount of his loss.

My Lords, the defender made an answer to the condescendence; and I will just repeat again, that I am not stating this with an assertion that it is true, or giving any intimation whether it is true or untrue; but upon the supposition that it may be true,—and where the question is, whether a man is fit to be the servant of the public, and where that question is to be decided by inquiries, and where the persons do not forget their duty so much as to say, I will give you no answer, although it is fit you should know what the reason is; and as they may be liable to all these actions;—your Lordships will see the grounds upon which, as I apprehend, upon the face of this case, it is a matter of public policy, that you cannot enforce this summons as the Court of Session thought fit to enforce it; and so involving the Board of Customs, the Treasury, and the Secretary at War, and the officers of the regiment, in this litigation,

With respect to the condescendence, the Earl of Home states he knows nothing of the facts stated relative to the pursuer's appointment, but he presumes they are correct. As to the second article, he says, ' With regard to the answer the defender is said to have made to Mr. ' Muirhead's inquiries where the pursuer resided, he calls upon the pur- ' suer to produce it. The defender kept no copy of it, as it was a casual ' inquiry, which he answered without thinking much about the matter, ' and he cannot, at this distance of time, recollect the precise expression ' he used; but he asserts he had no ill will to the pursuer, or intention of ' injuring him, and neither on that nor any other occasion could he have ' used expressions which were not strictly true. With regard to the as- ' sertion that the pursuer voluntarily quitted the regiment, it is matter of ' opinion, not of fact, when stated generally. The pursuer has not stated ' the facts. The defender now does so, and calls on the pursuer to con- ' fess or deny them. The following letters were transmitted to the de- ' fender, as Colonel of the regiment by Mr. William Christison, formerly ' a Lieutenant of the regiment:—' Edinburgh, 22d July 1814.—My Lord, " I beg leave to transmit to your Lordship a copy of a correspondence " between Mr. David Vass, paymaster of the Berwickshire militia, and me. " —Copy of Mr. Vass' two last letters to me from Tynemouth Barracks.— " Tynemouth Barracks, 25th of February 1814.—Sir, I have just now re- " ceived yours of the 23d instant. Any charge you have against me state " it, and I will settle it, whatever it may be; but, you low blackguard ras- " cal, settle your account with me, and I am your man in any shape what- " ever. I am your most obedient servant, (signed) David Vass, Paymaster " Berwickshire Militia. Mr. W. M. Christison.'—' Tynemouth Barracks, " 26th of February 1814.—Sir, I wrote you last night in very explicit " terms; but I must now, from your conduct, tell you again, that you are " nothing more or less than a low rascal. If you have the smallest bit of " flesh in your whole carcase, you may show it; but if there is a bit, it " must be a very small bit. In my opinion, there is not a bit of the kind " in your whole body. I am, Sir, your most obedient servant, (signed)

July 17. 1822.

"David Vass, Paymaster Berwickshire Militia.' Then Mr. Christison's two letters to Mr. David Vass are set forth:—'Edinburgh, 15th of July '1814.—Sir, I have always delayed answering your two last letters until 'I were certain you were in town. Now that I am so, I have only to 'say, that the language in these last two letters is not to be borne with, 'nor passed over in silence. I therefore must insist that you either 'fight me, or make an apology. I wait your answer in course. I am, 'Sir, your most obedient servant, (signed) William Christison. To Mr. 'David Vass.'—'Mr. David Vass' answer, in course, written on my card: 'Settle your accounts, and am your humble servant, (signed) D. V.'—'Edinburgh, 16th July 1814.—Sir, Your conduct is just what might 'have been expected from a cowardly but blustering poltroon. Your answer to my card of last night is just what might have been expected 'from a dastardly coward. Because my account is not settled, you are to 'hedge yourself under that poor pitiful pretence. If you still refuse to 'give the satisfaction demanded, I will instantly send a copy of the correspondence to the Colonel, your agents, the Secretary at War, and to 'the head-quarters of the regiment. The gentleman who bears this waits 'your answer. I am, Sir, your most obedient servant, (signed) Wm. 'Christison.' Mr. David Vass declined a meeting. Mr. Christison goes on, and represents the matter to the Colonel:—'Allow me to say, my 'Lord, that every gentleman, both civil and military, who have seen the 'correspondence, are of one opinion, and it is, that the expressions uttered 'by Mr. David Vass are such as could scarcely have been expected from 'the most abandoned worthless vagabond upon earth, and that he is a 'disgrace to the situation he holds, and to mankind besides, and that I 'have done just what I should have done. I meant to have sent a copy 'of the correspondence to the officers of the regiment, but my friends 'think it sufficient that your Lordship is made acquainted with the business.' I have sent the same to the Secretary at War, Messrs. Greenwood 'and Cox, and a number of Mr. Vass' friends and acquaintances, as this 'I have sent your Lordship; and I always remain, with due respect, 'my Lord, your Lordship's most obedient humble servant, (signed) Wm. 'Christison. I also beg leave to subjoin a copy of the placard which I 'meant to have put up in different parts of the town, but was strenuously 'advised from doing it by my friends.'—'Mr. David Vass, Paymaster, 'Berwickshire Militia, is a dastardly ruffian and an infamous coward. '(Signed) Wm. Christison.' Well, my Lords, this having been sent to the Secretary at War, I have understood—your Lordships perhaps may know whether that is the custom of the Secretary at War or not—that the declining a challenge is sometimes thought sufficient to dismiss a man from the service. 'The Secretary at War transmitted Christison's letters 'to the defender, and ordered him to inquire into the circumstances of 'the case: That the defender, after he had received the correspondence 'transmitted to him by Christison, stated the case to General Fuller, the 'Commanding Officer of the district, and General Fuller directed the defender to send for Mr. Vass, and ask him whether he acknowledged him-

July 17. 1822. 'self to be the author of these letters, and if he did, to put him under 'arrest: That the defender sent for the pursuer, and informed him of the 'orders he had received from General Fuller, and upon his admitting that 'he had written the letters, Mr. Vass was put under arrest accordingly: 'That the defender reported what he had done to General Fuller, who 'said he would state the matter to his Royal Highness the Commander 'in Chief, and request an order for summoning a Court-martial: That 'while the pursuer was under arrest, the Adjutant informed the defender 'that the pursuer wished to resign his commission, rather than stand a 'Court-martial: That the defender, in answer to this message, said that 'it was not in his power to accept of his resignation in the circumstances 'in which the pursuer stood: That the defender applied to General Fuller, 'at the pursuer's request, communicated by Captain M'Laren, the Ad-'jutant, for permission to accept Mr. Vass' resignation: That General 'Fuller gave permission, and a letter was sent by Mr. Vass resigning his 'commission: That, in consequence of that resignation, the pursuer was 'immediately struck off the strength of the regiment, as having resigned, 'on the 29th of July, and is returned as having resigned in the next re-'turns of the 10th of August; but having some accounts to make up, he 'was continued in the place, and not permitted to resign till the regula-'tion upon the subject with respect to paymasters was carried into effect: 'That the defender reported these proceedings to the Secretary at War, 'as it was his duty to do, upon the 4th of August, and received in reply 'the following letter:—'My Lord, I have the honour to acknowledge "the receipt of your Lordship's letter of the 4th instant, relative to the "dispute between Paymaster Vass and Mr. Christison, and to acquaint "you that the steps which your Lordship has taken thereupon appear to "me extremely proper. I have the honour to be, &c. (signed) Palmer-"ston." The pursuer, in answer, is called upon to confess or deny each of these particulars, and then he goes on to state, 'That the defender, when 'applied to by the Board of Customs, referred to the Secretary at War 'for the circumstances that took place relative to Mr. Vass' quitting the 'regiment. The Board of Customs having been referred by him to the 'Secretary at War, he apprehends they did apply to the Secretary at 'War, and that the consequence was, he was not appointed.'

Your Lordships will see that this is a case in which it becomes necessary, in order, if any justice whatever can be done, that not only the correspondence which is in the hands of the Board of Customs, but also all that has passed with the Secretary at War—and not only all that has passed with the Secretary at War, but all that has passed with the officers of the regiment—and not only all that has passed with the officers of the regiment, but all that has passed with respect to the Treasury, must all be set out. The Board of Customs are to be called upon to produce the documents they have in their hands relative to this transaction, going through so many public officers, inquiring into the conduct of an individual under all the circumstances in which Mr. Vass stood. The question is, whether, upon the grounds stated, the Board of Customs, as

the servants of the Crown, having these papers in their hands, are at liberty to produce them? So I must put the question. If they were at liberty to produce them, they might be compellable to produce them. There are many cases that bear upon this, which it is not necessary to go through. In the case of an information in the Court of Exchequer, where a man gives information as to smuggled goods, they will not allow you to ask who gave the information. So, as to cases of high treason, they will not allow a party to tell who gave the information. They will not allow it; and in a late case which I have in my hand, this matter was very much discussed, as far as the War Office was concerned, and which came very near to this. It is the case of Home *v.* Lord William Bentinck in the Exchequer Chamber in 1820, which refers to another case in the King's Bench, in Lord Ellenborough's time. There the principle is laid down—not that the right is, as here discussed, to withhold a document, because it is the property of the individual who has it—but because it is against public policy—that you should be compelled to produce instruments and papers, which if persons are compelled to produce, it must shut out the possibility of the public receiving any information as to a person's fitness to be appointed to an office. Upon these grounds it has been held, in this part of the country, we can enforce no such direction. I took the liberty to communicate with the Lord Chief Justice upon this case. I showed him the papers; and he stated, without the least hesitation, that he would not have permitted any such production as is here called for, upon the grounds I have stated. I do not find in the papers that they state any cases by way of precedent, except of the production being ordered in one instance, and refused in another. I allude to the late case of Leven against certain individuals, where they had ordered the production by the Commissioners of Excise for the pursuer, and refused to order it for the defender. I do not enter into the question whether, if they ordered it for the pursuer, they had any reason to distinguish between the cases. If your Lordships recollect that case, it was there one ground very much insisted upon in the argument, that the production ought not to have been called for; and it will likewise be in your Lordships' recollection, that the persons who had the honour of stating to your Lordships the grounds on which the judgment ought to be given in that case, were extremely studious to avoid saying any thing upon the question, whether in the one case the production had been properly compelled, or in the other properly refused, because there was, in your Lordships' opinion, quite enough to reverse the judgment without entering into that consideration. The case of Leven comes nearest to this. It was a case which the parties thought proper to appeal upon, but which did not make it necessary for your Lordships to decide upon that point. Upon the whole, it does appear to me it would be a very dangerous thing indeed, if this were permitted; and therefore it does seem to me that this judgment ought to be reversed.

July 17, 1822.

July 17. 1822. *Appellants' Authorities.*—James, Jan. 1. 1799, (3433); Young, Feb. 27. 1816, (F. C.); Buller's N. P. 284; 4. T. R. 140. 144; 2. Vesey jun. 189; Peake's L. of Ev. 93. 94. 95; 2. Raym. 927; 1. Strange, 646; 2. Strange, 717. 1005. 1203; 1. Wilson, 104. 239.

SPOTTISWOODE and ROBERTSON,—Solicitors.

(*Ap. Ca. No.* 32.)

No. 44. STIRLING and ROBERTSON, Appellants.—*Fullerton—Pollock.* W. GODDARD, Respondent.—*Jardine—Ivory.*

Insurance—Representation.—A party having in April effected an insurance on a vessel from Hull to America and home again, on a representation that she was immediately to sail; and the vessel not having been then ready to sail, and not having sailed till June; and a war with America having been expected, and having been declared in July; and the vessel having been ~~in the mean-while~~ taken and destroyed in August by an American privateer—Held (affirming the judgment of the Court of Session) that the underwriters were not liable.

July 19. 1822. 1ST DIVISION. Lord Alloway.

STIRLING and ROBERTSON, merchants in London, were proprietors of the ship Royal Bounty, of which John Robertson of Austin-Friars was the registered owner. In the spring of 1812 she was under repair in the port of Hull, and on the 18th of March Dopkin and Company, the carpenters, wrote to Stirling and Robertson, that 'you may rest perfectly satisfied no time shall be lost 'in getting the Royal Bounty away, but there is a great deal to 'do at her yet. I fear it will require the whole of the next month 'to get her to sea;' and on the 24th of that month they informed them that 'we have very bad weather just now, which is much 'against getting the Royal Bounty finished; but you may rely 'no exertions of ours shall be wanting to get her away as fast 'as possible.' The object of these repairs was to fit the vessel for a voyage from Hull to Prince Edward's Island or Bay of Chaleurs in America, and home again. On the 13th of April Stirling and Robertson wrote to Mr. Duncan, insurance-broker at Leith, stating—'Please insure £6000 on the hull and ma-'terials of the Royal Bounty, Captain H. Gambles, as may be 'afterwards valued, from Hull to her port or ports of loading in 'Prince Edward's Island, during her stay there, and from thence 'to her port or ports of discharge in Great Britain; the premium 'not to exceed seven guineas per cent.; and if a return can be 'obtained for sailing north about, or with convoy, you will of 'course get it inserted. The Royal Bounty has undergone a 'thorough repair at Hull, which has rendered her a substantial 'vessel, and she is in every respect properly equipped for the 'voyage. It is our intention to give her ten guns; but this, of

'course, we do not warrant, but only mention for your govern- July 19. 1822.
'ment. We suppose you can have no objection to guarantee the
'underwriters for the usual commission of one half per cent.'

Mr. Duncan accordingly applied to several underwriters, and among others to Mr. Goddard, and on the 21st of April obtained an insurance on the vessel, 'lost or not lost from Hull to her port 'or ports of loading in Prince Edward's Island or Bay of Chaleurs, 'during her stay there, and from thence to Clyde.' Mr. Duncan having reason to believe that the vessel was ready for sea, and was immediately to proceed on her voyage, in (consequence of an order which he had received from a Mr. Campbell of Greenock, on the 30th of March, to send provisions to her, and of a letter from the Captain on the 3d of April, stating, that if they were immediately transmitted they would be in sufficient time,) had represented to several of the underwriters, who subscribed the policy before Mr. Goddard, that the vessel was ready to proceed to sea, and that he was so satisfied that she would sail without delay, that he had written to a friend of his at Hull to sell the provisions which he had shipped for the vessel, in case they should not have reached Hull before the vessel sailed. Accordingly, in a letter which he addressed at a subsequent period to Stirling and Robertson, he stated, that 'I gave some of the underwriters rea-'son to think, from what I said to them at the time I effected the 'insurance, that the ship would soon be ready to sail, and I had 'every reason to think and to say what I did, as Mr. Campbell 'wrote to me of date 30th March, allowing me to ship provisions 'for her, on the condition that if the ship had sailed before they 'reached Hull, the provisions should lie to my account. That I 'might run no risk of the last, I wrote to Mr. Gambles, who re-'plied to me of date the 3d April, saying, I might ship them per 'first trader, as they would be in time. Under these circum-'stances, I consider I might say what I did with the greatest 'safety.' It did not appear, however, that he had made this representation to Mr. Goddard.

At this time there were considerable apprehensions that the war between this country and America, which subsequently took place, was about to break out. The vessel was not completely repaired till the 26th of May, and it appeared that she was a slow sailer. She remained in Hull till the 8th of June, when she sailed on her voyage; and some of the underwriters, having observed this from the newspapers, intimated to Mr. Duncan that they were not to be considered as responsible under the policy. To this he answered, that he had no power to free them from the risk which they had undertaken, and at the same time he com-

July 19. 1822. municated this circumstance by the above letter to Stirling and Robertson, and the representation which he had made to the underwriters.

War between this country and America was declared in the month of July, and the Royal Bounty was taken and burnt by an American privateer on the 1st of August, when she had almost reached her outward port of destination. The underwriters having refused to settle the loss, an action was brought against one of them, who resided in England, before the Court of Common Pleas, where a verdict passed against him, in consequence (as was alleged) of a defect in the evidence as to the representation which had been made. Some of them also settled extrajudicially; but Mr. Goddard having refused payment, an action was brought against him in 1815 by Stirling and Robertson before the Court of Admiralty. In defence he pleaded,—

1. That Stirling and Robertson were not the registered owners, but that the vessel was registered in name of John Robertson, and therefore they had no title to pursue.

2. That the representation that the vessel had, on the 13th of April, undergone a thorough repair, and was in every respect properly equipped at that time for the voyage, was not true, as the repairs were not completed till the month of June thereafter.

3. That the underwriters who subscribed the policy before him, had been induced to do so on the representation that the vessel was to sail in April, whereas she did not sail till June, and in the mean while lay in port, exposed to a greater danger of fire, &c. than at sea:—that if she had sailed in April, she might have been able to accomplish the voyage to America, and home again, before the equinoctial storms in September; whereas, by sailing in June, she must have been exposed, on her return home, either to them or to the tempestuous weather of winter, so that the risk was greatly increased:—and,

4. That if she had sailed in the month of April, she would have reached her port of destination before war was declared between this country and America, and might even have been able to return, or at least to clear the coast of America before hostilities were actually commenced, and therefore the risk was a different one from that which had been insured against.

To this it was answered,—

1. That although Mr. Robertson was the registered owner, yet the vessel truly belonged to Stirling and Robertson; but that, to obviate the defence, he had since been made a party to the action.

2. That the letter written by Stirling and Robertson to Mr. Duncan had been exhibited to the underwriters, and nothing was

there said as to the period at which the vessel was to sail; and that although it was there mentioned that she was equipped for the voyage, this had been done bonâ fide, in consequence of information from the carpenters to that effect;—and, July 19. 1822.

3. That the risks were not different from those which had been insured against, nor were they increased by the delay which had taken place in sailing. The Judge-Admiral appointed Stirling and Robertson to produce a copy of the proceedings in the Court of Common Pleas, and ordained Mr. Goddard to condescend specifically as to the representation which had been made by Mr. Duncan relative to the time at which the Royal Bounty was to sail; and at the same time he issued this note:—'By letter from Dopkin and Company 'to the pursuers, dated 18th March 1812, the latter were 'informed that the repairs of the Royal Bounty would, as the 'former feared, require nearly the whole of the next month; and 'by another letter, 24th same month, the pursuers were told that 'the weather was very bad, and retarded the work. Taking these 'in conjunction with all experience, that workmen never finish 'their work even in the time they appoint, the pursuers had 'surely no right, either in fact or in common reasoning, to write 'on the 13th April that the ship was fully repaired, 'and is in "every respect equipped for the voyage.' I cannot approve of 'this, nor can I think that any man could. I do not, however, say 'that this alone is enough to constitute a material misrepresentation in point of law, because the issue turns not on the point 'whether the ship was then fully repaired and fully equipped in 'every respect for the voyage; but, when combined with another 'representation as to the time of sailing, (which no man can doubt 'is material,) may have some effect. I therefore desire to know 'the precise fact, which the defender will be accurate in giving; 'and certainly the trial before Sir Vicary Gibbs deserves the 'greatest respect, for which reason I wish to see it.' A condescendence and answers were accordingly lodged, and the Judge-Admiral, on advising them, 'with a minute for Stirling and Robertson, and a letter from John Robertson of Austin-Friars, the 'registered owner of the ship Royal Bounty, sisting himself as a 'party to this action, and acknowledging that he gave authority 'for instituting it, held the said John Robertson as a party to it, 'and found that, in ordering insurance of said vessel, Stirling 'and Robertson, as acting for him, wrote to Mr. James Duncan 'of Leith, the broker who effected the insurance in question, a 'letter dated 13th April 1812, informing that the said ship was 'then fully repaired, and was in every respect equipped for her 'voyage from Hull to Prince Edward's Island or Bay of Cha-

July 19. 1822. 'leurs in America, and desired him to endeavour to insure her 'on that voyage, and during her stay there and home again: 'That the said James Duncan effected the policy libelled on, 'dated 21st April, and was so impressed by the said letter, and 'other directions which he got respecting the vessel that she 'would sail immediately, that when he made his representation 'to some of the underwriters who subscribed the policy before 'the defender, he stated that the vessel was not only fit and ready 'for sea, but would sail so soon, that he was afraid that she would 'be gone before he could possibly forward some goods which he 'had for her: That this representation was totally unwarranted, 'as the ship was not then repaired, nor fit for sea, and did not 'leave the dry dock wherein she was repaired sooner than the '26th day of May following, and did not sail on her voyage till 'the 8th day of June; and therefore found that the facts which 'occurred were very different from those which were represented 'to the underwriters; and so much were they impressed with this, 'that they gave notice to Mr. Duncan, almost immediately after 'the departure of the vessel from Hull, that they considered 'themselves to be free from the risk, and which intimation was 'by Mr. Duncan communicated to the pursuers: That it was un- 'necessary to inquire whether any greater risk was incurred by 'the vessel having sailed so late as the 8th of June, than would 'have existed if the vessel had sailed in the end of April, as the 'underwriters were entitled to make their own contract, and did 'make it on a very different representation of facts from those 'which truly existed; and therefore, although the risk of the 'vessel having sailed on the 8th of June was truly not greater, 'yet as it was not the risk which the defender undertook, assoil- 'zied him from the action, and found him entitled to expenses.'

Stirling and Robertson presented a petition against this judgment, in which they prayed to be allowed a proof by the opinion of skilful underwriters, that the alleged misrepresentation was not material to the effect of vacating the policy. The Judge-Admiral, accordingly, 'before answer, allowed the pursuers to prove that 'the detention of the Royal Bounty till the 8th of June 1812, 'when she sailed on her voyage to Prince Edward's Island, made 'no difference on the risk of insuring that vessel, although it was 'represented to the underwriters, when they undertook that risk, 'that she was to sail in the end of April, and that the broker, who 'had at that time some provisions to send for her to Hull, was afraid 'that they might not arrive there from Leith before the departure 'of the vessel, and allowed to the defender a contrary proof.' At the same time, he communicated his opinion in this note:—'Were

'the Judge to be the ultimate arbiter of this question, he would 'not allow any proof by others, whether the representation that a 'ship was to sail in April made no difference on the insurance when 'she did not sail till June. His idea is, that the underwriters in 'the policy are the sole judges of this. They underwrote on the 'representation that the ship was to sail in April; and if it be 'said it is no matter whether she sailed then, or not till June, as 'to the risk, it probably may be so; but their answer in law seems 'to be, that this may be the opinion of others, but it is not the 'contract they made, nor the risk they undertook. If, in repre-'sentation, any material misstatement being made annuls the 'policy—and this is held to be law—I cannot consider any one 'thing to be more important than the time of a vessel's sailing, 'particularly on such a voyage as the one in question, and at the 'particular period when it occurred.' A proof was accordingly taken by both parties, on advising which, the Judge adhered to his interlocutor assoilzieing the defender, and at the same time explained his views in the following note:—'The Judge-Admiral 'continues of the same opinion that he was before, that whether 'the risk was or was not increased by the Royal Bounty not sail-'ing till the 8th of June, instead of having sailed in the end of 'April, is of no importance, because it was not the risk under-'taken by the defenders; and so much were they impressed with 'this opinion, that they declared themselves free of the risk soon 'after the sailing of the ship, whereby the pursuers could easily 'have got others to underwrite, if the risk was not increased. 'Some witnesses say that the risk was not increased, and these 'seem chiefly to refer to or understand a risk in general, without 'respect to the particular ship in question, or to the expected 'American war; others say that the risk was increased on the 'same general principle; and a third class, that it was increased 'both in the general, and with reference to the said ship, and the 'year in which she sailed, owing to the expected American war. 'In deciding between these opinions, the Judge has no difficulty 'in adopting the last, that the risk was much increased, both 'from the fear of war, and from the ship itself being one of heavy 'burden, and being known to be a very slow sailer; and he 'cannot lay out of his view the circumstance already mentioned, 'that the underwriters declared themselves off from the risk im-'mediately on the vessel sailing so late as the 8th of June; 'and if the risk had not been increased, the pursuers would have 'accepted their declinature to abide by the contract, and procured 'other subscriptions, which they did not attempt.'

July 19. 1822.

A charge having been given for payment of the expenses,

July 19. 1822. Stirling and Robertson presented a bill of suspension, on advising which, with answers, the Second Division of the Court, on 27th February 1817, refused it.*

Stirling and Robertson then brought an action of reduction, on the grounds which they had mentioned in the Court of Admiralty; but the Lord Ordinary assoilzied Goddard. Against this judgment they reclaimed to the First Division, who, on the 3d of February 1819, adhered, and found them liable in expenses.†

Stirling and Robertson having appealed, the House of Lords 'ordered and adjudged that the interlocutors complained of be 'affirmed, with £100 costs.'

Respondent's Authority.—Marshall on Ins. 457. 463. 459. 450.

BOURDILLON and HEWITT,—SPOTTISWOODE and ROBERTSON,—Solicitors.

(*Ap. Ca. No. 33.*)

No. 45. JOHNSTON, SHARP, and COMPANY, Appellants.—*Gifford—Moncreiff—Buchanan.*
JOHN PHILLIPS, Respondent.—*Warren—Forsyth.*

Partnership—Bill of Exchange.—Circumstances under which it was held, (reversing the judgment of the Court of Session,) that a bill granted by a partner under the partnership firm for a private debt, but whereby it was alleged an advantage was derived by the Company, was not binding on it.

July 24. 1822. 1ST DIVISION. Lord Alloway. JAMES JOHNSTON junior, merchant in Glasgow, carried on business in his own name, and as a partner of Thomas Phillips and Company. In December 1813, a partnership was established between him and T. P. Sharp of Glasgow, and John Davidson of London, under the firm of Johnston, Sharp, and Company, merchants in Glasgow. Davidson continued to reside in London, and transacted the business of the company there, while Sharp

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* Not reported. In the case for the respondent it is stated that this judgment was unanimous, and that 'their Lordships all severally delivered their opinions, 'that there was a sufficient alteration in the risk, by the delay of the voyage, to 'authorize the judgment which had been pronounced in the Court of Admiralty.'

† Not reported. In the case for the respondent it is stated, that 'their Lordships of the First Division, upon considering the appellants' petition, with answers, 'entertained the same view of the case as that which had been successively 'adopted by the Judge-Admiral, by their Lordships of the Second Division, and 'by the Lord Ordinary.'

proceeded to the Continent, with the view of disposing of goods belonging to the company, which were to be purchased by Johnston, the managing partner at Glasgow. Early in the year 1814, Johnston purchased large quantities of goods on behalf of the company, (which, it was alleged by the respondent, he accomplished by means of his own private funds,) and sent them to Sharp, who disposed of them on the Continent, and remitted the proceeds in acceptances by the purchasers in favour of Johnston, Sharp, and Company, to the extent of £10,125. These bills were received by Johnston in the course of the month of May 1814, and it had been arranged that the proceeds were to be placed in bank, under a deposit-account to be opened in name of Johnston, Sharp, and Company. Instead of doing so, however, Johnston deposited the proceeds in different banks in Glasgow in his own name; and in particular he so placed about £3000 with the Glasgow Bank. On the 3d of June Johnston made a settlement with the Glasgow Bank of his private account, on which a balance of £2870 was ascertained to belong to him; and this sum he on the same day placed under an account which he opened in name of Johnston, Sharp, and Company. July 24. 1822.

In the mean while Johnston, as an individual, had discounted certain bills with the Glasgow Bank, amounting to £1650, which he had obtained in the course of his private business; and on the day on which the above settlement took place, (but subsequent to it,) these bills were returned, dishonoured by the acceptors, to the Bank. In consequence of this, Johnston was obliged to call a meeting of his private creditors, which was held on the following day; and it was then agreed to give him indulgence in point of time. To this, however, the Glasgow Bank was not a party; and when Johnston, a few days thereafter, wished to draw money from the account opened in name of Johnston, Sharp, and Company, (with a view to retire some of their acceptances which were about to fall due,) the Bank refused to permit him to do so, until he should pay those bills which he had discounted with them as an individual, and which had been dishonoured. He then applied to the respondent Phillips, (who was the father of Johnston's partner in the firm of Thomas Phillips and Company,) and an arrangement was entered into, by which the Bank, in consideration of an acceptance by Phillips for the amount of the dishonoured bills, agreed to allow Johnston to draw from the funds placed under the account of Johnston, Sharp, and Company. On the part of Phillips it was stated, that he accepted the bill blank in the drawer's name, on the understanding that it was to be drawn and indorsed under the firm of Johnston, Sharp, and Company, as he

July 24. 1822. considered that he was interposing his credit on their behalf; but that Johnston had, without his knowledge, inserted his own name as an individual, and so had indorsed it to the Bank. In consideration of this bill, Johnston granted an acceptance to Phillips under the firm of Johnston, Sharp, and Company, for £1650, being the amount of the dishonoured bills, which he delivered to him at the same time in further security; and Phillips granted a back letter, addressed to Johnston, Sharp, and Company, stating that he held these dishonoured bills merely in security for the payment of the acceptance which had been granted for his relief. In consequence of this transaction, Johnston got access to the funds of the company, and was thus enabled (as was alleged by Phillips) to prevent that company from being declared bankrupt.

Thereafter Sharp having returned from the Continent, and having made a settlement with the creditors of Johnston, Sharp, and Company, (who had become embarrassed,) brought an action in name of the company against Phillips, concluding for reduction of the bill of £1650, which Johnston had granted to him under the firm of the company, on the ground that it had been granted by Johnston for his own private accommodation, of which Phillips was aware. In defence it was pleaded,—

1. That the acceptance which Phillips had granted, and which he had since retired, was a beneficial act in favour of the company, as Johnston was thereby enabled to draw the funds of Johnston, Sharp, and Company, and so to prevent them from being declared bankrupt; and therefore, as the money was in rem versum of them, and the bill had been granted on that understanding, it was a valid and binding document of debt against the company; and,—

2. That it was of no importance whether the Bank were entitled to have acted as they had done or not, and that it was sufficient for him to show that, by incurring an obligation on account of the company, they had derived advantage from it. To this it was answered,—

1. That it was plain, even from the statement of Phillips himself, that he was aware that he was interfering merely on behalf of Johnston in his individual capacity, and that it was not relevant to allege that thereby an indirect advantage was obtained by the company; but that, in point of fact, the company enjoyed ample sources of credit, without being under the necessity of applying to Phillips for an accommodation;—and,

2. That Phillips was interested in upholding the credit of Johnston, who was the partner of his son, and who was a joint obli-

gant, along with Phillips himself, on bills which were then in the circle. July 24. 1822.

The Lord Ordinary, after appointing Phillips 'to give in a condescendence stating the facts and circumstances he offered to instruct, in order to establish the value paid by him for the bill under challenge,' found 'it positively averred, and not contradicted, 'that, for some time previous to the 3d day of June 1814, James 'Johnston junior, who then resided in Glasgow, as the managing 'partner of Johnston, Sharp, and Company, had deposited, in 'his own name, in the banks of Glasgow, money to the amount 'of £10,125, which, it is said, was the property of Johnston, 'Sharp, and Company:—that, from whatever source that money 'had arisen, the banks would have been entitled to retain it 'until they were relieved of the bills which had become due by 'James Johnston junior, in whose name alone it was deposited:— 'that, upon the 3d day of June, James Johnston transferred the '£10,125 standing in his own name to the deposit-account 'of Johnston, Sharp, and Company:—that, upon the 4th of 'June, three of James Johnston's bills lay over protested and 'unpaid at the Glasgow Bank to the amount of £1650, and 'upon that day, it is said, he called a meeting of his creditors:— 'that it is offered to be proved, and not distinctly denied, that 'when James Johnston junior attempted, by checks, to draw a 'part of the money deposited in the name of Johnston, Sharp, 'and Company from the Glasgow Bank, they refused to pay the 'same:—that it is unnecessary to determine whether they were 'legally entitled to do so, on account of the suspicious circumstances of the case:—that these bills were retired by the defender 'having granted his acceptance for that amount; and that James 'Johnston, for his relief, then granted him the bill in question, 'in name of Johnston, Sharp, and Company, and by which means 'the funds of Johnston, Sharp, and Company, which had been 'retained by the Bank, were released:—that although no partner 'of a company is entitled to grant an obligation, under the firm 'of the company, for his own private debt, and the person who 'receives such an obligation, and is acquainted with the nature 'of it, will not be entitled to recover from the company; yet, in 'the whole circumstances of this case, the defender having every 'reason to believe that this transaction was for the benefit of the 'company, and it was so far in rem versum of the company, as 'they could not then have had access to their own funds until 'the sum of £1650, for which this bill was granted, was retired; 'therefore assoilzied the defender from the conclusions of the 'action.'

July 24. 1822.

Against this interlocutor Johnston, Sharp, and Company offered a representation, in which, while they maintained that the allegations of Phillips were irrelevant, they denied them, and stated that it was incumbent on Phillips to establish them. The Lord Ordinary appointed them to say whether they were willing to pay the previous expenses, upon a proof being allowed of the facts which were now explicitly denied by them; and they having declined to pay them, he adhered to his interlocutor. To these judgments the Court also adhered, on advising two petitions and answers, on the 18th of June 1818, and 3d February 1819.*

Johnston, Sharp, and Company having appealed, the House of Lords 'found, that, in the whole circumstances of this 'case, the bill for £1650, with respect to which the process of 'reduction is raised, ought not to be considered as binding on 'the firm of Johnston, Sharp, and Company; and it is therefore 'declared and adjudged, that the said bill is null and void as 'against the said company, and ought to be reduced as prayed 'by the libel; and it is further ordered and adjudged, that the 'said several interlocutors complained of be reversed; and it is 'further ordered, that the cause be remitted back to the Court 'of Session, to do therein as shall be just and consistent with this 'judgment.'

LORD CHANCELLOR.—My Lords, in the case of Johnston and Phillips, upon looking at the several interlocutors, and the several matters to be found in those interlocutors, it seems to me that the principal question is, Whether the transaction between these persons is a transaction in which Mr. Phillips has a right to say that the partnership is bound. The Court of Session have agreed in holding that Mr. Phillips had a right to say that the partnership was bound. But, upon a very accurate and sifting attention to the circumstances of the case, as stated to your Lordships, I am of opinion that he had no such right; and that the consequence of that would be, that the interlocutors must be reversed. As I am therefore clearly of opinion that in this case Mr. Phillips took a security which, under the circumstances, he could not take so as to bind the partnership, the result will be, that the interlocutors will be reversed.

J. CAMPBELL,—A. MUNDELL,—Solicitors.

(*Ap. Ca. No.* 35.)

* Not reported.

TRUSTEES of the late WM. FORBES of Callendar, Appellants.— *Thomson—Cranstoun—Maconochie—Alison.*
Reverend Dr. WILSON, Minister of Falkirk, Respondent.— *Gifford—Connell.*

No. 46.

Stat. 1633, *c.* 21.—*Grass Glebe.*—Held, (reversing the judgment of the Court of Session,) that certain lands which had been held in commonty by the Abbey of Holyroodhouse and the family of Livingstone of Callendar were not kirk lands, liable to be allocated to the minister of the parish as a grass glebe.

July 24. 1822.

2D DIVISION. Lords Newton, Craigie, and Reston.

PRIOR to the Reformation, the town and lands of Falkirk were divided into two halves, the whole being held directly of the CROWN, without any feudal dependency upon each other,—the one belonging to the Livingstones of Callendar,—and the other to the Abbey of Holyroodhouse. Accordingly it appeared that in 1458 James the Second granted a charter of confirmation to James first Lord Livingstone, by which he confirmed to him 'omnes 'et singulas terras baroniæ de Caliendar,' and in which the reddendo clause was thus expressed :—'Reddendo annuatim pro præ-'dicto castro de Calentare, et viginti librat. terrarum antiqui ex-'tentûs baroniæ de Calentare, superscript. viz. 'le Strath, le "Forest de Calentare, qui sunt quinque librat. terrarum antiqui "extentûs; *dimidietat. villæ de Falkirk*, quæ terræ sunt quinque "mercati terrarum antiqui extentûs; duas Carmuirs, quæ sunt "decem mercat. terrarum antiqui extentûs; duas Auchingavins, "cum lie Glen, quæ sunt quinque mercat. terrarum antiqui ex-"tentûs; necnon terras de Easter Jal, quæ se extendunt an-"nuatim ad duas mercatas terrarum, cum dimidia mercat. "terræ antiqui extentûs; alba firma pro uno denario argenti, "usualis monetæ regni nostri Scotiæ, solvend. apud castrum de "Calentare, nomine albæ firmæ, si petatur tantum, non obstan. "tota baronia de Calentare, aliisque de nobis tent. in wardo et "relevio." In the subsequent titles which were granted to the family of Livingstone, the conveyances were expressed in similar terms. There was, however, a muir attached to the lands of Falkirk, called the South Muir, which was held in commonty by the Abbey and the Lords Livingstone.

After the Reformation, the half of the lands of Falkirk belonging to the Abbey came into the possession of the family of Bellenden; and in 1606 it was conveyed by Sir James Bellenden to Alexander, seventh Lord Livingstone, and first Earl of Linlithgow and Callendar, by whom a Crown charter of resignation was expede. These two halves were accordingly engrossed in future in the titles of the family of Livingstone.

In 1646 a royal charter was granted, erecting the estates be-

July 24. 1822. longing to that family in Stirlingshire into a regality, of which Falkirk was to be the head burgh, and in which the clause of union was thus expressed: 'Insuper nos et unimus et erigimus 'prædictam villam de Falkirk, tam illam partem quæ ab antiquo 'tenebatur de Abbatibus de Holyroodhouse, quam residuam par-'tem dictæ villæ de Falkirk, quæ ab antiquo fuit pars prædictæ 'baroniæ de Callendar, prout eadem ex utraque Eatene publicæ 'viæ nostræ ejusdem jacent, in unum integrum et liberum bur-'gum regalitatis, burgum de Falkirk nuncupat.' &c.

Previous to the time when these two halves came into the possession of the family of Livingstone, feus had been granted, and servitudes of pasturage were acquired by the feuars over the South Muir. The lands and barony of Callendar and Falkirk having been forfeited in 1715, they were sold by the Crown to the York Buildings Company, and were afterwards acquired by Mr. Forbes at a judicial sale in 1783, including the part called the South Muir. This muir consisted of about 150 acres of land which had never been cultivated, but was of a nature susceptible of improvement. In 1808, Mr. Forbes brought an action of division of the common; and 110 acres were allotted to him as proprietor of the barony of Callendar. In 1809, Dr. Wilson, the minister of Falkirk, presented a petition to the presbytery of Linlithgow, setting forth that he had no grass glebe, and that there were kirk lands in the parish, out of which he prayed that a sufficient quantity should be allocated to him in terms of law. The presbytery, on the 1st of December 1809, after making inquiry, found that the South Muir were kirk lands; and that, as they had never been in an arable state, they were subject to the minister's claim for a grass glebe; and allocated 20 acres for that purpose out of the part which, in the process of division, had been allotted to Mr. Forbes. Against this judgment he presented a suspension; and having proceeded to improve and cultivate the lands, Dr. Wilson brought a suspension and interdict against his doing so, on which the Lord Ordinary on the Bills granted an interim interdict. Both cases having come before Lord Newton, his Lordship conjoined the suspensions; 'and in 'the suspension and interdict at Dr. Wilson's instance, in respect 'there is no evidence produced to instruct that the lands assigned 'by the presbytery were kirk lands, recalled the interdict, and 'found the letters orderly proceeded; and in the suspension at 'Mr. Forbes's instance, suspended the letters and charge simpliciter.' In a representation against this judgment, Dr. Wilson founded on a charter granted in January 1546 by Alexander Lord Livingstone to Robert Oswald and his spouse and son, in

which he alleged it was stated that the muir had belonged to the Abbey of Holyroodhouse. This deed, however, he did not produce, but stated that it was in the possession of a person of the name of Smith, of whose titles it formed a part. Being afterwards required by the Lord Ordinary to produce all the documents on which he founded, and having obtained a diligence for that purpose, he put into process a paper which was said to be an excerpt from it, made and attested by one George Home, who designed himself 'one of the clerks of his Majesty's Regis-'ter-house at Edinburgh,' but who, it was afterwards explained, held no official situation whatever, and had made the excerpt under the authority of Dr. Wilson alone. That gentleman also stated (and it so appeared on a proof,) that Smith had subsequently destroyed the original deed, for reasons which were not satisfactorily accounted for. In these circumstances, Dr. Wilson contended that the excerpt ought to be received as the best evidence, and as conclusive on the point at issue, or at least as confirming the other evidence of the lands having belonged to the Abbey, and so kirk lands. On the other hand, Mr. Forbes maintained, that the circumstances under which the excerpt had been made, were so suspicious that it could bear no faith; and that it was plain from its terms that it was not a faithful copy, as there were inconsistencies on the face of it. The excerpt was, however, produced and received by the Court, the material part in it being the tenendas clause, which was thus expressed: 'Te-'nen. et habend. totam et integram præfatam dimidietatem ter-'rarum mearum, et villæ de Falkirk antedict., cum pertinen., præ-'fatis Roberto et Elizabeth suæ sponsæ, ac eorum alteri diutius '.....in libero tenemento et vitali redditu, pro toto tempore ipsor-'um vitæ, et Alexandro Oswald, filio secundo genito, &c. in feo-'difirma et hæreditate in perpetuum, per omnes rectas metas 'suas, &c. prout jacen. in longitudine et latitudine, in domibus, 'ædificiis, &c. ac cu. co. pastura sup. morâ vulgariter dictâ 'Southm^r. p. me Monasterii Sanctæ Crucis prope Edinburg. cõi-'ter. tenta, liberoq. introitu et exitu, ac cum omnibus aliis et 'singulis libertatibus, potestatibus, juribus, privilegiis, &c. in præ-'fata mea originali carta contentis, datis et concessis, cum suis 'pertinen. quibuscunque, tam non nominatis quam nominatis, '&c.; reddendo inde annuatim dicti Robertus Oswald et Eliza-'beth Williamsoun, ejus sponsa, &c. mihi, hæredibus meis et as-'signatis, summam duarum mercarum, usualis monetæ regni Sco-'tiæ, ad duos anni terminos consuetos, festa, viz. Pentecostes et 'Sancti Martini in hieme, per æquales portiones, nomine feudi-'firmæ,' &c.

July 24. 1822.

July 24. 1822. Lord Craigie, having succeeded as Ordinary to Lord Newton, reported the case on memorials; and the Court having allowed a proof relative to the circumstances under which the charter 1546 had been destroyed, thereafter, on the 1st February 1817, found 'that the lands in question are subject to the designation of a 'grass glebe in favour of the pursuer (Dr. Wilson); and re-'mitted to Lord Reston, instead of Lord Craigie, to hear parties 'further on the extent of the glebe which has been designed by 'the presbytery, and to do thereanent as he shall see cause;' and found Mr. Forbes liable in £750 of expenses.

In the mean while, and after the interdict had been recalled by Lord Newton, Mr. Forbes had proceeded to cultivate the lands which had been allocated to Dr. Wilson, and by which he alleged that he had so much improved them, that they were now worth £100 per annum. He therefore contended, that the extent of the ground allocated ought to be restricted to that which was sufficient for a grass glebe, in terms of the statute 1663, cap. 21. To this it was answered, that Dr. Wilson was entitled to the ground which had been allocated by the presbytery, and that their decree could not be affected by improvements and alterations made pendente lite. Lord Reston found, that 'the charger 'is entitled to such a quantity of the ground in question as was 'sufficient to pasture a horse and two cows, according to its ac-'tual state and situation at the time of his application to the 'presbytery for a grass glebe,'—reserving any claim of relief for meliorations made upon the ground in question. To this judgment the Court adhered by refusing two petitions, with answers, on the 14th of January and 10th of June 1818.*

Mr. Forbes having died, his trustees were sisted as parties in his place, and appealed against these judgments, on the ground,

1. That there was no evidence that the lands in question were kirk lands, and that it was incumbent on Dr. Wilson to make out that fact; that the excerpt of the charter of 1546 was not entitled to any faith; and that it was plain that the words 'per me *Monas-'terii* Sancti Crucis prope Edinburg cõiter tenta,' which Dr. Wilson translated as meaning 'holden by me in commonty *of* 'the Abbey of Holyroodhouse,' could not be those which were originally in the charter; but that, if such a deed ever existed, the words must have been, 'per me *Monasterio* Sancti Crucis, &c., 'cõiter tenta,'—meaning, in reference to the muir, that it was 'held by me in common *with* the Abbey of Holyroodhouse,' which was consistent with the fact, and with the other titles.

* See Fac. Coll. June 10. 1818, No. 170.

2. That the evidence which had been produced established that the muir had not been the absolute property either of the Abbey of Holyroodhouse, or of the family of Livingstone, but was enjoyed by them in commonty, and that such lands were not subject to allocation; and,— July 24. 1822.

3. That the extent of ground which had been allotted to Dr. Wilson was too great; and it was perfectly competent, where the ground has been subsequently improved, even pendente lite, to restrict the decree to that which is sufficient to afford pasturage to a horse and two cows. To this it was answered by Dr. Wilson,—

1. That there was evidence to show that the whole lands of Falkirk, including the muir in question, originally belonged to the Abbey of Holyroodhouse; and that this fact was put beyond doubt by the charter 1546, the excerpt from which was, in the existing circumstances, entitled to complete faith, to the effect of supporting the other evidence; and,—

2. That it was not competent to alter the state of matters pendente lite, so as to restrict the decree of the presbytery, which alone had jurisdiction to fix the extent of the glebe.

The House of Lords found, 'That the paper-writing, purporting to be an excerpt from a charter bearing date the 11th January 1546, from Alexander Lord Livingstone of Callendar to Robert Oswald and Elizabeth Williamson, his spouse, and Alexander Oswald, their second son, and his heirs-male lawfully procreate of his body, appears upon the face thereof to be so imperfect and inconsistent, as not to be deserving of credit for the purpose of determining the question between the parties in this cause, independent of any other objection which may arise from the circumstances stated in evidence concerning the same: But find that it appears from the whole of the evidence produced in the Court of Session, that the land called the South Muir was held in commonty by the Abbey of Holyroodhouse, and the Lords Livingstone, as seised of the barony of Callendar, subject to certain servitudes of common pasture thereon; and that the said William Forbes having become entitled to the rights in the said South Muir, both of the Abbey of Holyroodhouse, and of the Lords Livingstone, in respect of their said barony of Callendar, subject to such servitudes, did proceed to obtain a division of the said muir, and that 110 acres, part thereof, were allotted to the said William Forbes, without distinguishing what part thereof did belong to him in respect of the rights which he derived from the Abbey of Holyroodhouse, or what part thereof belonged to him in respect of the rights which he

July 24. 1822. 'derived from the Livingstone family in right of their barony of 'Callendar, in commonty with himself, as deriving title from the 'Abbey of Holyroodhouse, in undivided shares: But find that 'the undivided part or share in the said muir, which did belong 'to the said Abbey of Holyroodhouse, was kirk land within the 'intent and meaning of the act 1663, and that therefore part of 'the said 110 acres ought to have been allotted to the said Wil- 'liam Forbes in respect of the right which he derived from the 'said Abbey of Holyroodhouse, and another part ought to have 'been allotted to him in respect of his rights in the barony of 'Callendar; and in as much as the presbytery found that the 'entirety of the muir of Falkirk, on the south side of the town, 'was kirk land, and thereupon proceeded to set out 20 acres of 'ground, part of the said 110 acres, as kirk land for the accom- 'modation of the minister, for grazing a horse and two cows, as 'a grass glebe, whereas only a part undivided of the said 110 'acres was kirk land, and consequently only an undivided part of 'the 20 acres, part of the said 110 acres so set out by the pres- 'bytery, was kirk land; so that the proceeding of the said pres- 'bytery, in setting out the said 20 acres, as if the entirety of the 'said 110 acres had been kirk land, was erroneous; and it is 'therefore ordered and adjudged that the several interlocutors 'complained of be reversed.'

Appellants' Authorities.—2. Ersk. 10. 62; 4. Ersk. 1. 54. 56. 58; Quon. Attach. c. 53. § 7; M. of Avondale, Jan. 10. 1733; 4. Stair, 32. 9; 2. Ersk. 10. 62; Grierson, June 26. 1778, (5162); Min. of Dollar, July 9. 1807, (F. C.); Forbes, Nov. 26. 1755, (5127); 2. Ersk. 10. 62; Min. of Dunfermline, March 25. 1812, (F. C.); Massie, July 12. 1785, (8377.)

J. CHALMER,—SPOTTISWOODE and ROBERTSON,—Solicitors.

(*Ap. Ca. No.* 36.)

No. 47. WILLIAM TAYLOR, Appellant.—*Brougham.* SAMUEL LITTLE, Respondent.—*Moncreiff*—*More.*

Stat. 54. *Geo. III. c.* 137.—*Bankrupt*—*Sequestration.*—Held, (affirming the judgment of the Court of Session,)—1.—That a coal-lessee dealing in coal, although not buying it, is liable to sequestration; and,—2.—That it is no objection that the affidavit of the creditor applying for sequestration has been made before a Justice of the Peace in Ireland.

July 26. 1822. 1ST DIVISION. THE appellant, Mr. Taylor, held leases of several very extensive coal-works in the county of Ayr, the produce of which he disposed of chiefly by exporting it to the Irish market. His affairs

having become embarrassed, he executed a deed of trust, conveying his whole effects to trustees for behoof of his creditors; and among others, Mr. Murdoch, writer in Ayr, acceded to this arrangement. After the management had been for some time in the hands of these trustees, the respondent, Mr. Little, a merchant in Stewartstown in the county of Tyrone in Ireland, a creditor of Mr. Taylor, (but who had not acceded to the trust,) presented a petition to the Court of Session for sequestration of Mr. Taylor's estates. In support of this application Mr. Little produced an affidavit which he had made at Dungannon, on the 20th of August 1818, in presence of William Murray, Esq. one of his Majesty's Justices of the Peace for the county of Tyrone, and in which he deponed that a debt of upwards of £200 was owing to him, and that he believed that Mr. Taylor carried on business as a coal-master, coal-merchant, and grain-dealer, or otherwise fell within the description, and not within the exceptions of persons liable to sequestration. In evidence of the bankruptcy, he founded upon a caption which had been obtained by Mr. Murdoch subsequent to the date of the trust, 'for not making payment to the 'complainer of the principal sum of £120, and the legal interest 'thereof since due, and till payment, deducting all partial pay-'ments made to account thereof which can be legally instructed, 'contained in the promissory note of M'Harg and Wallace, mer-'chants in Ayr, and the said William Taylor, dated the 15th day 'of February 1818,' and on which caption an execution of search, dated 2d October 1818, was returned. Mr. Taylor made appearance, and objected to sequestration being awarded, on the ground, July 26. 1822.

1. That although he was a coal-owner or coal-lessee, and as such worked the coals let to him, and sold them; yet he did not purchase coals in order to sell again, and therefore he was not within the description of persons who make their living by buying and selling, and so liable to sequestration; and that neither could he be characterized as a grain-merchant, because the only purchases which he had made were for the purpose of paying the wages of his coaliers in grain instead of money; and that although, from peculiar circumstances, he had been obliged to dispose of part of that grain in the market, yet this could not constitute him a grain-merchant in the sense of the statute.

2. That the petition for sequestration was not supported by the documents required by the statute; and, in particular, first, That the affidavit was objectionable, because it was made before an Irish Justice of the Peace, without having any authority from the Courts in Scotland; and, second, That it was made prior to the act of bankruptcy, which did not take place till the 2d of October

July 26. 1822. 1818, whereas the affidavit was dated on the 20th of August preceding.

3. That the caption was illegal; first, Because Mr. Murdoch, being an acceding creditor to the trust, was barred from doing diligence on his debt; and, second, Because it was uncertain in its terms, as it was issued for a debt, 'deducting all partial payments made to account thereof which can be legally instructed;' and therefore, as the diligence was illegal, there had been no act of bankruptcy in terms of law.

To these pleas it was answered,—

1. That Mr. Taylor was an extensive dealer in coals, and that it was not necessary, according to the Scottish statute, that he should both buy and sell, it being sufficient that he manufactured and prepared coals for the market, and made a material part of his living by the disposal of them:—that, besides, he was a partner of several companies trading in Dublin, and usually designed himself 'merchant' there; and that it was proved by documents recovered from the consignees, that he had bought and sold grain to a considerable amount.

2. That it was quite sufficient that the affidavit was emitted before a Justice of the Peace within Great Britain or Ireland, and that no commission from the Scottish Courts was necessary; nor was it required by the statute that the execution of the caption, or other diligence creating the bankruptcy, should be prior to the affidavit:—that, besides, the execution had been postponed by a bill of suspension, which had been ultimately dismissed: And,

3. That Mr. Murdoch was not barred from doing diligence, nor was it any objection to sequestration being awarded that he had acceded to the trust, and the debt on which the diligence was done had been subsequently acquired by him:—that it was res judicata, by the refusal of the bill of suspension, that he was entitled to execute that diligence;—and that the terms of the caption were such as were usual in similar cases.

The Court, on the 11th of February 1819, awarded sequestration; and thereafter an interim factor and trustee were successively appointed, and Mr. Taylor applied for a personal protection in terms of the statute. He, however, afterwards presented a petition for recal of the sequestration, on the same grounds on which he had maintained that it should not be awarded; but the Court, on the 22d of May 1819, refused the petition, and found him liable in expenses.*

He then entered an appeal; but the House of Lords 'ordered and adjudged that the interlocutors complained of be affirmed.'

* Not reported.

Appellant's Authorities.—(1.)—Stewart, Feb. 15. 1812, (F. C.); Jeffrey v. Russel, 1816, (not rep.)—(3.)—Rex v. Hall, 1. Cowper, 60. July 26. 1822.

Respondent's Authorities.—(1.)—1. Bell, 368.—(3.)—1. Ross, 290.

J. RICHARDSON,—C. BERRY,—Solicitors.

(*Ap. Ca. No.* 38.)

JAMES CARRICK, Appellant.—*Gifford—Forsyth.* No. 48.
JAMES MARTIN and COMPANY, and THOMAS MARTIN and COMPANY, Respondents.—*Clerk—Skene—Rutherfurd.*

Meditatio Fugæ Warrant.—Circumstances under which it was held, (affirming the judgment of the Court of Session,) that it is not a sufficient ground of suspension of a meditatio fugæ warrant, that the oath of the petitioner and the declaration of the defender have been taken by the clerk and assessor of a royal burgh acting in virtue of a commission by the Magistrates,—the warrant bearing to have been issued by a Magistrate, on considering the oath and declaration.

JAMES CARRICK, a merchant and mercantile agent in the island of Martinique, was employed in the latter capacity by Thomas Martin and Company of the island of Guadaloupe, (a branch of Thomas Martin and Company, merchants in Glasgow,) to dispose of goods which they consigned to him. In the year 1816 he came to Glasgow, at which time it was alleged he had a large balance in his hands belonging to Martin and Company. The affairs of that company having become embarrassed, a conveyance of their effects was made to Alexander Wighton and others, as trustees for their creditors; and in the month of June 1817, these trustees, having reason to suspect that Carrick was about to leave the country without settling the balance, presented a petition to the Magistrates of Glasgow, stating that James Martin and Company had, through their partners Thomas Martin and Company, made large consignments to Carrick, who had hitherto rendered no regular account-sales:—that 'he is justly 'due to the petitioners, as trustees for James Martin and Com-'pany's creditors, a sum exceeding £4000 sterling:—that they 'are about to commence an action of count and reckoning and for 'payment against him, but that they had received information, 'and verily believed, that the said James Carrick was in medi-'tatione fugæ, and about to leave the country, with a view of 'eluding the petitioners' just demands.' They therefore prayed the Magistrates 'to grant warrant for apprehending the said 'James Carrick and bringing him for examination, and there-

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Leckie, he subscribed this warrant: 'Having considered the de- July 26. 1822.
'claration of James Carrick, and former procedure, grants war-
'rant for imprisoning the said James Carrick, till he find caution
'to the effect craved in the petition.' Carrick was not brought into the presence of the Magistrate when this warrant was issued. Of these proceedings he did not complain by bill of suspension, but found caution, in consequence of which he was liberated. Two days thereafter the trustees of Martin and Company raised an action of count and reckoning against him, concluding for £20,000 sterling, more or less, and expenses of process. A great deal of procedure took place in this action, in the course of which the trust having been brought to a conclusion, Martin and Company were sisted as parties in place of their trustees. At last Carrick having failed to produce certain accounts, he was held as confessed by the Magistrates, and decree was pronounced against him in terms of the libel. Thereafter his cautioners presented him in Court in terms of their bond, and were liberated from their obligation accordingly. A bill of advocation was then presented by Carrick, on which a remit was made to the Magistrates to proceed in the cause; and Martin and Company having applied incidentally by a minute for a warrant of imprisonment against Carrick, until he should of new find caution to abide the issue of the action, a warrant to that effect was granted by the Magistrates, on which he was forthwith imprisoned, without any new deposition by Martin and Company, or examination of Carrick. He thereupon presented a bill of suspension and liberation, without caution or consignation; on advising which, with answers, the Lord Ordinary reported the case to the Court upon memorials. In support of his application Carrick maintained,—

1. That as the petition proceeded on a charge of intending to fly from Scotland to avoid making payment of his just debts, this was of the nature of a criminal accusation; and that it was necessary, before a warrant of imprisonment could be granted, that the oath of the party making the accusation should have been taken before a Magistrate, and that the examination of Carrick ought also to have been in the presence of the Magistrate, and the deposition and declaration authenticated by his signature; but that this had not been done, and therefore the warrant was illegal.

2. That even regarding the proceeding as one of a civil nature, yet, as a warrant of this description was a remedium extraordinarium, it was not competent for the Judge or Magistrate to delegate to any clerk or servant of his Court the duty of examining the complainer upon oath, or of taking the examination of the accused party, and any allegation of a practice to that effect was irrelevant and illegal, and ought to be checked: And,—

July 26. 1822. 3. That, after having been presented in Court, the original procedure came to an end, and that it was not competent to issue a new warrant of imprisonment without a new oath being emitted by the party complaining, and a new examination into the circumstances being made; and this the more especially, as the new warrant on which he was imprisoned had been granted at the instance of a different party from the one who presented the original petition.

To this it was answered by Martin and Company,—

1. That warrants of this description were not of a criminal nature, but merely a summary process pursued ad civilem effectum, and therefore it was not necessary, as in criminal proceedings, that every thing should take place in presence of the Magistrate; and that there was no statute or imperative rule of law requiring that the proceedings under such an application should take place as a matter of solemnity before a Magistrate.

2. That, being a civil process, it was perfectly competent for the Magistrate to delegate his power to any person duly qualified to take the oath and declaration, as was usually done in all civil cases:—that the clerk to whom the delegation in this case was granted did not issue the warrant; but that, on the contrary, it was done by the Magistrate before whom the whole procedure was laid, and who had thus an opportunity of considering it before issuing the warrant; and that Carrick himself had acquiesced in this, and had allowed proceedings to go on for a long period without taking any objection, so that he was barred personali exceptione from now doing so:—that, in the case of Magistrates of Burghs generally, the judicial business was usually conducted by means of assessors or clerks, similar to recorders in England, and who were much better qualified than the Magistrates, who were annually changed, and were in general ignorant of law proceedings, and who, it was notorious, were guided by their advice:—that, in particular, such had been the mode of conducting business for time immemorial in the Burgh Court of Glasgow, each of the three clerks having commissions to act as the assessors of the Magistrates, and to advise the proceedings which came before them:—that it had been the invariable practice in that Court, and in almost all the Burgh Courts in Scotland, to delegate to one or other of the assessors or clerks power to take proofs and declarations, which had never hitherto been objected to; and,—

3. That the application for the new warrant was made by the party having the real interest in the matter, who had applied originally, and that it was not necessary, where cautioners

had been liberated, pendente lite, by presenting the party, to require a new oath or examination. July 26. 1822.

The Lord Ordinary, on advising with the Court, refused the bill, but found no expenses due. Against this interlocutor Carrick presented a petition; on advising which, with answers, and a minute lodged by Martin and Company, explaining that Mr. Thomson was the legal assessor as well as town-clerk of the burgh, and was authorized to advise the summary actions, and to take proofs generally, the Court, 'with a view to establish an 'uniform practice in future in the administration of the law re-'garding the granting of warrants against persons as in medita-'tione fugæ, they, before answer, ordered copies of the whole 'printed papers in this cause, of the minute now put in, and a 'copy of this deliverance, to be laid before the Judges of the 'other Division of the Court, and the permanent Lords Ordinary 'for both Divisions of the Court; and the Lords, in terms of the 'act of Parliament thereanent, required the opinions of these 'Judges, either as a collective body, or as individual Judges, 'whether the warrant in this case is or is not a legal warrant, 'in respect that neither the oath nor the declaration have been 'taken in the personal presence of the Magistrate, but on com-'mission by Mr. Robert Thomson, one of the joint town-clerks 'and assessors for the city of Glasgow, holding the powers as set 'forth in the said minute and printed papers.'

Lords President, Hermand, Balgray, and *Cringletie,* in consequence of this remit, returned the following opinion:—'We 'are of opinion, that it is not a legal objection to a warrant 'against a debtor as in meditatione fugæ, that neither the 'oath of the creditor, nor the declaration of the debtor, were 'taken in the personal presence of the Magistrate, but on com-'mission by the town-clerk holding a general commission, as set 'forth in the minute. We are of opinion, that a warrant against a 'debtor, as in meditatione fugæ, does not possess any character of 'a criminal proceeding, but is merely a precautionary measure 'for securing a civil debt in particular circumstances; and as the 'practice has been inveterate and universal for all Courts and 'Magistrates in Scotland to take proofs and oaths and examina-'tions by commission, we cannot discover any principle for dis-'tinguishing between the oaths and examinations in an applica-'tion for a meditatione fugæ warrant and any other civil process; 'neither do we see any expediency in making such a distinction, 'as the Magistrate remains equally responsible for the warrant 'he grants, whether the oaths and examinations have been taken 'in his own presence or not.'

July 26. 1822. *Lords Balmuto, Succoth, Gillies, Pitmilly, Alloway*, and *Reston*, delivered this opinion:—'In obedience to the interlocutor of 'the Second Division, signed on the 23d of May last, we have 'considered the printed papers in this case, and humbly report 'that we are inclined to think, that in applications for warrants 'against a debtor, on the ground of his being in meditatione fugæ, 'the oath of the creditor and declaration of the debtor ought to 'be taken in presence of the Magistrate, and cannot competently 'be taken on commission,—and on that account the warrant 'granted against the suspender was illegal.'

On advising these opinions, with the petition and answers, the Court, on the 14th November 1818, by a majority, adhered to the interlocutor refusing the bill of suspension.*

Against these judgments Carrick appealed, and in the mean while Martin and Company obtained an interim decree against him in the action of count and reckoning, upon which, after a suspension had been finally refused, they executed a caption against him in gaol; and in addition to their former pleas, they now maintained, that the object of the bill of suspension and liberation, under which the judgments appealed against had been pronounced, was no longer in existence, seeing that it was impossible to liberate Carrick, as he was now imprisoned upon diligence to which he could not and did not object.

The House of Lords 'ordered and adjudged that the interlo-'cutors complained of be affirmed.'

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* See Fac. Coll. Nov. 14. 1818, No. 185, from which report it appears that the *Lords Justice-Clerk* and *Robertson* were of opinion that the proceedings were objectionable, because neither the oath nor declaration had been taken in presence of a Magistrate, and that the practice (if it did exist) ought immediately to be checked. On the other hand, *Lord Glenlee* held that it was not a matter of solemnity that either the oath or the declaration should be emitted in presence of a Magistrate; that, particularly in relation to Burgh Courts, it seemed more conducive to justice that these examinations should be taken by the assessor who was in the practice of advising the Magistrates, and guiding them in their judgments; and that there might perhaps be a distinction as to a Sheriff.—*Lord Bannatyne* proceeded on the latter ground, and on the practice of the burgh of Glasgow, and thought that the Magistrate must be responsible in any action of damages for irregularity committed by the clerk; but he was of opinion that it was not sufficient to suspend the diligence, that the oath and declaration had been taken by the clerk acting under a commission, and not by the Magistrate.—*Lord Craigie* concurred in the same conclusion at which these two Judges arrived, but thought there was a distinction, where the application for the warrant proceeded on an allegation that the debtor was going to carry away his funds, and so defraud his creditors, and where it was merely alleged that he was about to leave the country. In the former case, the application was of a criminal nature, and the proceedings ought to take place in the presence of a Magistrate. In the latter it was merely civil, and was to be regulated by the usual form of process in civil matters; and he considered that the warrant in question was of the latter description.

LORD CHANCELLOR.—This, my Lords, is a case that was argued in this House during the course of this session. James Carrick states himself lately to have been a merchant in the island of Martinique, and detained at present as a prisoner in the gaol of Glasgow; and James Martin and Company are also described as carrying on a considerable trade to the West Indies, and which was managed at Glasgow. July 26. 1822.

The appellant was originally in prison upon a process to prevent his leaving the country. Proceedings had gone on, and the debt, I believe, upon which he was incarcerated, amounted to more than £3000; and this appeal was brought before your Lordships, insisting that the proceeding had been irregular from the beginning—that the process in which the warrant granted against him as being in meditatione fugæ was wrong. My Lords, it would have been due to the person making this application to have given more immediate judgment in the case, if the circumstances had satisfied those whose duty it was to consider them, that he was entitled to have a reversal of this proceeding; for if so, the consequence would be, that he might have been liberated from incarceration. But I have not been able to discover that there was such error in the proceedings, as to advise your Lordships to reverse the judgments.

My Lords, we have in this country a process for the purpose of preventing the flight of a person, which we apply not only to persons actually resident in this country, but to persons who may be occasionally here, and which is attended with great hardship sometimes. In the latter case we do require that an equitable debt should be proved and sworn to, in order to warrant that process; for a legal debt will not do, because it is a species of equitable aid. Such a debt is required to be sworn to, and in such a way as to satisfy the Court that such a debt is due. I have no difficulty in saying, that the manner in which this debt is sworn, would not have been sufficient to authorize the person who addresses you to issue the writ of ne exeat regno in the Court below. But I think it is a dangerous thing, on the ground of any practice which obtains in our Court, to overturn that which the Judges in the Courts of Scotland have thought to be right,—sufficient regard being had to their own notions of practice; and here the matter has been permitted to proceed from one end to the other, without an objection of the nature which I have stated. But there is an objection that the affidavit in this case, which they call a deposition and the examination of the party, was not sworn before a Magistrate of Glasgow, but before a person who might be represented as his assessor, and whom they assimilate to our Recorder. Certainly, however, there is no great resemblance between them. With respect to this question, the Judges of the Court of Session have been extremely divided. The Judges of the Second Division thought it right to take the opinion of the Judges of the First Division, and there was a great difference of opinion among them; but the final decision was, that the deposition and examination were sufficient to be held as a deposition and examination made before a Magistrate, by the circumstance of a Magistrate signing. And, to be sure, if the Court of Session finally

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thought that this was sufficient to support the process, your Lordships would think long before you would overturn that opinion, for it is stated without contradiction from all time to have been the mode of proceeding; and many of your Lordships know that, in our own practice, what is called swearing before a Judge is an oath administered by a person in an outer chamber, while the Judge is in an inner room. Your Lordships see what vexation it might lead to, if, in our opinion, we decided that which, in the opinion of the Court of Session, has been thought to be sufficiently formal,—regard being had to the fact of there being no dispute whatever as to the terms of the deposition.

But in truth, my Lords, it appears to me that the objection should have been made much earlier than it has been made; because, if it be valid, it will not only have the effect of rendering the business unauthentic, but will go even to the extent of stopping the proceedings which subsequently took place. I feel no difficulty in saying, that I shall not advise your Lordships to overturn that which, in point of practice, they think is conformable to the law. I cannot think it would be good advice to give to your Lordships. I would therefore move that, under a view of the whole circumstances of the case, your Lordships should affirm the interlocutors complained of.

LORD REDESDALE.—Will your Lordships allow me to say, that the Noble Lord does not appear to recollect that the delay in this case has been of no importance, because the party was incarcerated upon a judgment obtained in the action? This decision could merely go to determine the doubt.

LORD CHANCELLOR.—Certainly. Under the actual circumstances of the appeal, if there had been any reversal of the interlocutor, it would have been of no benefit to him now.

LORD REDESDALE.—It would have had no effect in accomplishing his liberation.

Appellants' Authorities.—2. Mack. 41; Hume, c. 11. § 5; Borthwick, May 14. 1813, (F. C.); Anderson, Nov. 26. 1814, (F. C.); Tait's J. P. *voce* Med. Fug. War. 208.

SPOTTISWOODE and ROBERTSON,—J. CAMPBELL,—Solicitors.

(*Ap. Ca. No.* 39.)

Hon. MARIANNE MACKAY HAMILTON FULLARTON, Appellant. —*Gifford—Forsyth.*

Sir HEW DALRYMPLE HAMILTON, Respondent.—*Thomson—Jameson.*

No. 49.

Et è contra.

Res Judicata—Prescription—Tailzie.—An heir of entail having brought an action of reduction of certain deeds as in contravention of the entail, and concluding for forfeiture of the heir in possession, and to find her entitled to the estate; and the defender having been assoilzied; and she having thereafter brought another action founding on the deeds as valid, and as to giving to her a right to the estate in preference to a succeeding heir—Held, (affirming the judgment of the Court of Session,) that the decree of absolvitor did not form a res judicata to bar the second action; but the Court of Session having assoilzied on the merits, the House of Lords remitted for review, and for the opinions of all the Judges.

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2D DIVISION. Lord Reston.

JOHN LORD BARGANY had two sons, John Master of Bargany and William,—and a daughter Nicolas. On the 19th of June 1688, and upon the marriage of John Master of Bargany with Miss Sinclair, eldest daughter of Sir Robert Sinclair, a contract of marriage was executed, by which the said 'Lord Bargany, in 'contemplation of the said marriage, and for the tocher after 'mentioned, by the tenor hereof binds and obliges him and his 'heirs and successors, always with and under the burden of the 'liferent provision above mentioned, hereby contracted and pro- 'vided to the said Mrs. Jean Sinclair, in manner above written, 'and also with and under the express reservations, burdens, re- 'strictions, provisions, declarations, and clauses irritant under 'written, allenarly, and no otherwise; whilks are hereby appointed 'to be contained in the procuratories and instruments of resigna- 'tion, charters, precepts, sasines, and infeftments to follow hereup- 'on; with all possible and convenient diligence, duly and validly 'to infeft and seise, by charter and sasine, titulo oneroso, in com- 'petent form, the said John Master of Bargany, and the heirs- 'male to be procreate of the said marriage betwixt him and the 'said Mrs. Jean Sinclair, his future spouse; whilks failing, the 'heir-male to be procreated of the body of the said John Master 'of Bargany in any other marriage; whilks failing, William Ha- 'milton, his brother-german, second son to the said John Lord 'Bargany, and the heirs-male to be procreated of the body of 'the said William Hamilton; whilks failing, the heirs-male to be 'procreated of the body of the said John Lord Bargany; whilks 'failing, the eldest heir-female of the body of the said John Lord 'Bargany, and the descendants of her body, without division; 'whilks failing, the next heir-female to be procreated of the body

July 26, 1822. 'of the said John Lord Bargany, and the descendants of the 'body of the said next heir-female, the eldest heir-female, and the 'descendants of her body, always excluding other heirs-por- 'tioners, and succeeding without division; whilks failing, John 'Houston, younger of that ilk, sister's son to the said John Lord 'Bargany, and the heirs-male of the body of the said John Hous- 'ton,' &c. This deed also contained a procuratory of resignation, with all clauses necessary for constituting a strict and effectual entail. In particular it required, 'That the haill heirs of tailzie, 'as well male as female, and the descendants of their bodies, who 'shall happen to succeed to the said lands, baronies, and others 'foresaid, according to the foresaid destination, or by virtue of 'the said writ apart sua to be granted by the said John Lord 'Bargany, shall be obliged to assume, use, and bear the surname, 'arms, and designation of Hamilton of Bargany, as their proper 'surname, arms, and designation in all time thereafter. And if 'any of the said heirs of tailzie, male or female, and the descend- 'ants of their bodies, who shall happen at any time hereafter to 'succeed to the said lands and others foresaid, shall do in the 'contrair hereof, then and in that case the said heirs of tailzie, 'male or female, and the descendants of his or her bodies sua 'contravening, shall ipso facto amit, lose, and tyne their right, 'title, and succession above specified to the said lands and others 'above mentioned, and the samen in the case foresaid shall ipso 'facto fall, accresce, and pertain to the next heir of tailzie who 'would succeed if the contravener and the descendants of his or 'her body were naturally dead; and it shall be leisome to the 'said next heir of tailzie to establish the right thereof in his or 'her person, either by adjudication, declarator, or serving heir 'to the person who died last vest and seised therein preceding 'the contravener, (and that without being liable to the contra- 'vener his or her debts or deeds,) or by any other manner of way 'consisting with the laws of this kingdom; and the persons sua 'succeeding upon the contravention, and the descendants of their 'bodies, shall be obliged to assume, bear, and wear the said sur- 'name, arms, and designation, under the like irritancy to which 'the said haill heirs of tailzie, and the descendants of their bodies, 'who shall happen to succeed to the said lands and others fore- 'said, are to be subject and liable, through all the succession, in all 'time coming; and also providing, likeas it is hereby specially 'provided and declared, that such of the said heirs of tailzie suc- 'ceeding to the said lands and others foresaid, who shall not have 'right to the honours, titles, and dignities of Lord Bargany, by 'virtue of the patent of honour granted to the said John Lord

'Bargany his father, shall be bound and obliged, under the irri- July 26. 1822
'tancy above written, to do their utmost to obtain and procure
'from his Majesty and his royal successors, a new patent, con-
'ferring upon them and the heirs of tailzie above specified the
'honour, title, and dignity of the Lord and Lady Bargany; and
'also providing alwise, likeas it is hereby specially provided and
'declared, and appointed to be contained in and declared by the
'instruments of resignation, charters, precepts, infeftments, and
'others to follow hereupon, that it shall not be leisome nor law-
'ful to the said John Master of Bargany, or the heirs-male of
'his body, or any others the members of tailzie above mentioned,
'to alter, innovate, or change the foresaid tailzie and order of suc-
'cession above mentioned, or to do any other deed, directly or in-
'directly, in any sort, whereby the same may be any ways altered,
'innovated, or changed.'

John Master of Bargany predeceased his father, without having been infeft; and thereafter his father having died, William, the second son, (and who was now Lord Bargany,) made up titles, without regard to the entail, by service and retour, as nearest lawful heir-male of his father. The entail, however, was afterwards, on the 27th of July 1694, recorded in the register of tailzies; and he thereupon obtained himself served heir of tailzie and provision in general to John Master of Bargany, his brother, in virtue of the deed 1688; but he was never infeft.

John Master of Bargany had, by his marriage with Miss Sinclair, an only daughter, Joanna Hamilton, who in 1707 married Sir Robert Dalrymple, eldest son of Lord President Dalrymple, proprietor of the estate of North Berwick. By their contract of marriage, the Lord President entailed his estate of North Berwick, reserving his own liferent, in favour of Sir Robert and his heirs in a certain order:—'Declaring, that in case there
'should be more sons than one of the foresaid marriage, and
'that the succession of the estate of Bargany shall fall and de-
'volve upon the heirs-male thereof, then and in that case, the
'said heir accepting of the said estate of Bargany, and the
'descendants of his body, shall ipso facto amit and lose all right
'and interest he had or could pretend to the lands, &c. of North
'Berwick and others hereby disponed, and the succession thereof
'shall immediately devolve to the next son of the said marriage.'
The Lord President, however, reserved a power to discharge and qualify any of the provisions of this deed, and to renew the same at pleasure.

Sir Robert, and his wife Joanna Hamilton, died before the Lord President, leaving three sons and two daughters, viz. Sir

July 26. 1822. Hew Dalrymple, (grandfather of the respondent,)—John, who afterwards assumed the name of Hamilton,—Robert, who was a doctor of medicine, and died without issue,—Marianne, the mother of the appellant Mrs. Fullarton,—and another daughter, whom it is unnecessary to notice.

In the mean while William Lord Bargany died, leaving a son James, and a daughter Grizzel. James (who now became Lord Bargany), was then served heir of tailzie and provision in general to his father William, and thereupon took possession of the estate, but was never infeft. His sister Grizzel married a Mr. Buchan, by whom she had an only daughter, Mary Buchan.

James having died without issue, a competition arose for the estate,—the claimants being first, Sir Hew Dalrymple, the son of Joanna Hamilton, and grandson of John Master of Bargany; second, Mary Buchan, daughter of Grizzel, and grand-daughter of William Lord Bargany; and, third, Sir Alexander Hope, who was the son of Nicolas, daughter of John Lord Bargany, the entailer, and consequently his grandson.

An obstacle, however, arose against the claim of Sir Hew,—at least to the effect of taking both Bargany and North Berwick,—in consequence of the prohibition which Lord President Dalrymple had inserted in his entail. His Lordship, however, in virtue of his reserved power, executed a deed proceeding on this narrative:—'Considering that I have full power and faculty re-'served to me to discharge that quality and condition contained 'in the contract of marriage last mentioned, disabling the heir-'male of the marriage, called to the succession of the tailzied 'estate of North Berwick, under an irritancy, to accept the estate 'of Bargany, and to discharge the said irritancy, and so to enable 'Hew Dalrymple, the eldest son of the marriage, to become heir 'of tailzie to James Lord Bargany, last deceased, and at the 'same time to enable and capacitate him to bruik and enjoy the 'tailzied estate of North Berwick; and also considering that there 'is nothing in the tailzie contained in the contract of marriage of 'the Master of Bargany to hinder the same person to be heir to 'the estate of Bargany, and of any other estate, providing that 'the heir of Bargany do assume, and always bear and retain the 'name and arms of Hamilton of Bargany as their proper name 'and arms; neither is there any thing in the tailzie of the estate 'of North Berwick to hinder the heir of North Berwick to enjoy 'and possess the estate of Bargany, and to use and always retain 'the name of Dalrymple of North Berwick jointly with that of 'Hamilton of Bargany, except the clause above specified, which 'I have power to discharge; and upon all these considerations, at

'present I am fully satisfied that it is the interest of both fami- July 26. 1822.
'lies that the said Hew Dalrymple be enabled so far to accept of
'the succession to the estate of Bargany, as to be served and re-
'toured heir of tailzie to that estate, and thereby be in a condi-
'tion to denude himself thereof in favour of the next person after
'him called to the succession by the tailzie of the said estate of
'Bargany, which is the most regular and effectual manner of con-
'veying the said estate in favour of the next person in the line of
'succession by the tailzie of the said estate of Bargany.'

On this narrative he stated, that 'I am therefore resolved so
'far to exercise the powers and faculties reserved to me to alter,
'innovate, qualify, revoke, or discharge the clauses and provisions
'contained in the contract of marriage last mentioned, as to en-
'able the said Hew Dalrymple to accept of the succession to the
'estate of Bargany, and to obtain himself served and retoured
'heir of tailzie to the said estate. Therefore I do hereby alter,
'revoke, and recal the foresaid provision in the said contract of
'marriage, whereby he is disabled to accept of the succession of
'the estate of Bargany, without incurring the irritancy above
'mentioned relating to the estate of North Berwick, and where-
'by in the present case both estates are not allowed to be estab-
'lished or subsist in one person for any time longer or shorter;
'and in consequence thereof I do hereby discharge the irritancy
'subjoined to the said prohibitory clause, whereby it is provided
'that the heir of North Berwick, and the descendants of his body,
'shall forfeit his right and title to the estate of North Berwick,
'in case of his accepting of the succession to the estate of Bar-
'gany; and I do hereby authorize and allow him to be served
'and retoured heir of the tailzied estate of Bargany, according to
'the provisions and conditions contained in the tailzie of the said
'estate of Bargany. Accordingly I do, by virtue of the said fa-
'culty reserved to me, authorize and allow him to take upon him,
'use, and retain the name and arms of Hamilton of Bargany, as
'his proper name, arms, title, and designation, so long as he is
'and shall be allowed to continue in the right of both estates of
'Bargany and North Berwick, and no longer; provided always,
'that he do also use and retain the name of Dalrymple of North
'Berwick, with such addition to the proper arms of Bargany as
'is allowed and consistent with the tailzie of Bargany; reserving
'always full power and liberty to me to revoke, alter, or innovate
'what I have hereby granted and allowed to the said Hew Dal-
'rymple, and to oblige him to denude himself of the estate of
'Bargany at such a time and in such manner as he shall be or-
'dained and appointed to do, by a writing under my hand, at

July 26. 1822. ‘ any time in my lifetime, etiam in articulo mortis, and with power ‘ and faculty to me to renew and redintegrate the said provision ‘ that was contained in the foresaid contract of marriage.’

His Lordship also at the same time executed another deed, in which he stated—‘ After full and deliberate reflection and ma- ‘ ture consideration in what manner it is just and reasonable for ‘ me to exercise the powers and faculties lodged in me by the ‘ foresaid contract of marriage, and still reserved to me by the ‘ exercise of it in the writ above mentioned in favour of the said ‘ Hew Dalrymple, allowing him to be served and retoured heir ‘ of tailzie to the deceased James Lord Bargany and his prede- ‘ cessors, notwithstanding that he is now fiar of the estate of ‘ North Berwick, and to enjoy the fruits and emoluments of the ‘ estate of Bargany without incurring any irritancy or penalty; ‘ so long as he shall be allowed to continue in the right of the ‘ said estate of Bargany, I, the said Sir Hew Dalrymple, do here- ‘ by, in virtue of the said power and faculty reserved to me, ‘ allow the said Hew Dalrymple to continue in the possession of ‘ the estate of Bargany during all the days of my life, and to con- ‘ tinue to use and bear the name, title, and arms of Hamilton of ‘ Bargany, as his own proper name, title, and arms, during the ‘ space aforesaid, with such additions with respect to my name, ‘ title, and arms, as may be consistent with the said tailzie of the ‘ estate of Bargany, and no longer; and I appoint and ordain the ‘ said Hew Dalrymple, fiar of the estate of North Berwick, and ‘ his heirs, to divest and denude himself omni habili modo of his ‘ right and title to the estate of Bargany in favour of John Dal- ‘ rymple, his second brother, and the heirs of his body; which ‘ failzieing, to Robert Dalrymple, now his third brother, and the ‘ heirs of his body; which failzieing, to the other heirs appoint- ‘ ed to succeed to the estate of Bargany by the tailzie thereof, ‘ and that within the space of six months after my decease, in ‘ ample form.’—‘ Reserving to the said Hew Dalrymple the haill ‘ fruits and emoluments of the estate of Bargany from the de- ‘ cease of the said James Lord Bargany to the period at which ‘ he is hereby appointed to divest and denude himself of the same; ‘ declaring that his refusing or delaying to denude himself of the ‘ foresaid estate of Bargany, after the term and period hereby ‘ appointed for that effect, or his continuing to possess and intro- ‘ mit with the rents and emoluments of the said estate of Bargany ‘ after the foresaid term and period appointed for denuding him- ‘ self, shall import an irritancy of his right and title to the estate ‘ of North Berwick, which estate of North Berwick shall ipso ‘ facto fall and accresce to the said John Dalrymple and the heirs.

'male of his body, and failzieing of him, to the said Robert Dal- July 26, 1822.
'rymple and the heirs-male of his body, and to the other heirs
'appointed to succeed to the estate of North Berwick by the said
'contract of marriage.'

In consequence of the permission contained in these deeds, Sir Hew, pending the competition, took possession, on his apparency, of the estate of Bargany, granted factories, and assigned the rents.

After a great deal of litigation between the competing parties, the House of Lords, on the 27th March 1739, 'ordered and ad-
'judged, that the said estate of Bargany doth descend to the said
'Sir Hew Dalrymple, the eldest son of the daughter, and only
'child of John Master of Bargany, and that he ought to be served
'heir of tailzie and provision to the said James Lord Bargany.'*

In the mean while the Lord President died; and after the above decision, Sir Hew Dalrymple, on the 13th of August 1740, executed a deed proceeding on a narrative of the entail of the estate of North Berwick, and of the result of the competition, in these terms:
'And now I, the said Sir Hew Dalrymple, having duly considered
'the foresaid tailzie of the estate of North Berwick, contained in
'the foresaid contract of marriage, and also the tailzie of the
'estate of Bargany above mentioned, dated the 19th day of
'June 1688 years, and that it appears to have been intended
'by the parties to the contract of marriage betwixt the said Sir
'Robert Dalrymple and Mrs. Joanna Hamilton, my father and
'mother, that the said two estates of North Berwick and Bar-
'gany should be separately taken and possessed by the heirs of
'the marriage betwixt the said Sir Robert Dalrymple and Mrs.
'Joanna Hamilton, except in the cases therein excepted; and
'that in case I should now take the succession of the estate of
'Bargany, I would thereby forfeit the right to the estate of
'North Berwick, for myself and my descendants, in favour of
'John Dalrymple, counsellor at law, my brother-german; and I
'being fully resolved to take and hold the estate of North Ber-
'wick, and to allow the estate of Bargany to descend to and be
'taken by the said John Dalrymple in the terms of the entail of
'the estate of Bargany; therefore, and for the love and respect
'which I have and bear to the said John Dalrymple, and in con-
'sideration of the settlements of the estates of North Berwick
'and Bargany above recited, wit ye me, with and under the pro-
'visions after mentioned, to have repudiated, likeas I by these
'presents do repudiate and refuse to accept the succession of the
'said estate of Bargany, and that to and in favour of the said John

* See 1. Craigie and Stewart's Appeal Cases, No. 47.

July 26. 1822. 'Dalrymple, the next heir of tailzie in the said estate of Bargany: 'And I consent that the said John Dalrymple shall, in respect 'of my repudiation as aforesaid, serve himself heir of tailzie and 'provision to the said James Lord Bargany, and otherwise make 'up titles in his person to the said estate of Bargany, in such 'manner as is competent of the law, and as he shall be advised; 'and that the said John Dalrymple do instantly take possession 'of the said estate of Bargany, and uplift the rents thereof in the 'tenants' hands, fallen due since the death of the said James 'Lord Bargany, and in time coming: Providing always, that 'these presents shall noways prejudge my own or my descend- 'ants' right to take the succession of the said estate of Bar- 'gany upon failure of the said John Dalrymple and Dr. Robert 'Dalrymple, my third brother, and their descendants, or in case 'any event shall exist, in which I or my descendants can take 'the said succession consistent with the foresaid tailzie of the 'estate of North Berwick; with which express provision these 'presents are granted by me, and accepted by the said John 'Dalrymple.' No notice was taken in this deed of those which had been executed by the Lord President, with a view to the competition, and it was not inserted in any record.

On obtaining this deed of repudiation, John Dalrymple, under the name and designation of John Hamilton, second son of the deceased Sir Robert Dalrymple, raised an action of declarator against Sir Hew and the other substitutes under the entail of Bargany, in which, after narrating that entail, and the deed of repudiation executed by Sir Hew, he concluded, 'that it ought 'and should be found and declared, by decreet of the Lords of 'Council and Session, that the said John Hamilton, pursuer, hath 'the only right and title to the succession to the said estate of 'Bargany, and that he ought to be served heir of tailzie and pro- 'vision to the said James Lord Bargany in the said lands and 'estate of Bargany, comprehending the several lands, baronies, 'and others contained in the tailzie made by John Lord Bargany 'in the contract of marriage betwixt the said John Master of Bar- 'gany and Mrs. Jean Sinclair, after the form and tenor of the 'writs before narrated, and laws and practice of this realm, used 'and observed in the like cases.' Decree in absence was pronounced on the 26th of February 1741, and by which the Court 'found and decerned and declared conform to the conclusions of 'the libel.' John Hamilton then obtained a general service, the retour of which stated, that 'quod quondam Jacobus Dominus 'Barganie, unicus filius demortui Gulielmi Domini Barganie, fra- 'tris quondam Joannis Magistri de Barganie, et qui Gulielmus

'erat pro-avunculus Joannis Hamilton de Barganie, Armigeri, July 26. 1682.
'juris consulti, filii secundi demortui Domini Roberti Dalrymple
'de Castletown, procreat. inter illum et demortuam Dominam
'Joannam Hamilton, unicam filiam et prolem dicti demortui Jo-
'annis Magistri de Barganie, latoris præsentium, obiit ad fidem
'et pacem S. D. N. Regis, et quod dictus Joannes Hamilton est
'legitimus et propinquior hæres talliæ et provisionis dicto demor-
'tuo Jacobo Domino Barganie, suo consanguineo, secundum con-
'tractum matrimonialem init. et perfect. inter dictum Joannem
'Magistrum de Barganie, cum avisamento et consensu demortui
'Joannis Domini Barganie, sui patris, ex una parte, et Magistram
'Jeannam Sinclair, natu maximam filiam demortui Domini Ro-
'berti Sinclair,' &c. The retour also stated that he was nearest heir of tailzie and provision, according to the judgment of the House of Lords, to the deed of repudiation of Sir Hew, and the decreet of declarator.

By virtue of this general service, John Hamilton acquired right to the procuratory of resignation in the entail 1688, (which had never been executed,) and on the 26th of July 1742 he resigned those parts of the estate of Bargany which held of the Prince, and obtained a charter of resignation under the Great Seal, the dispositive clause of which was thus expressed:—'Di-
'lecto nostro Joanni Hamilton de Barganie, juris consulto, filio
'secundo demortui Domini Roberti Dalrymple de Castleton, pro-
'creat. inter illum et demortuam Dominam Joannam Hamilton,
'unicam filiam demortui Joannis Magistri de Barganie, et sic
'hæredem fæmellam demortui Joannis Domini Barganie ejus avi,
'et hæredibus quibuscunque ex corpore dict. Joannis Hamilton,
'quibus deficien. aliis hæredibus quibuscunque ex corpore dict.
'Dominæ Joannæ Hamilton procreat. inter illam et dict. Domi-
'num Robertum Dalrymple, absque divisione; quibus deficien.,
'aliis hæredibus fæmellis ex corpore dict. demortui Joannis Do-
'mini Barganie absque divisione, hæres fæmella natu maxima, et
'descendentes ex ejus corpore omnes alias hæredes portionarias,
'semper excluden., et absque divisione succeden.; quibus deficien.,
'hæredibus masculis ex corpore nunc demortui Domini Joannis
'Houston,' &c. Then follow the other substitutions in the original entail of Bargany as already recited, together with the prohibitory, irritant, resolutive, and other clauses and limitations contained in this deed.

The quæquidem clause, after deducing the titles from the deed of entail, and mentioning the procuratory of resignation therein contained, stated, that 'et ad quam procuratoriam resig-
'nationis, terras aliaque inibi content. dict. Joannes Hamilton de

July 26. 1822. 'Barganie nunc jus habet tanquam hæres tallize et provisionis in 'generali servit. et retornat. dict. demortuo Jacobo Domino Bar- 'ganie, secundum ejus generale servitium coram Balivis Vici Ca- 'nonicorum de data 12. Septembris 1741, ad Cancellariam debite 'retornat.' And it then recited that this was fortified by the judgment of the House of Lords, by the deed of Sir Hew, and the decree of declarator.

In like manner, John Hamilton, by executing the procuratory of resignation in the entail 1688, obtained charters of those parts of the lands which held of subjects superiors; and on these respective deeds he was duly infeft in August and September 1742.

Under these titles he thenceforth possessed the estate of Bargany; but when he had arrived at an age at which he had scarcely any prospect of issue, and his elder brother, Sir Hew, being still alive, he executed a deed, on the 21st of June 1780, in these terms:—'Be it known to all men by these presents, me, John 'Hamilton of Bargany, Esq. for certain causes and considera- 'tions me moving, and in order to give effect to the entail exe- 'cuted by John Lord Bargany in his son's contract of marriage, 'of date the 19th day of June 1688 years, and to the condi- 'tions upon which my own right and title to the lands under men- 'tioned was founded, to have given, granted, and disponed, likeas 'I hereby give, grant, and dispone to and in favour of myself, 'and the heirs of my body, without division; whom failing, to 'Sir Hew Dalrymple, Bart. my brother, and the heirs of his 'body, without division; whom failing, to the next heirs of the 'body of John Lord Bargany aforesaid, and the other heirs of 'tailzie contained in the foresaid deed of entail, in the order 'therein expressed, and which heirs of entail are herein after in- 'sert, word for word, as in the said deed of entail.' On this deed infeftment was taken on the 25th of October 1780.

In the mean while, Dr. Robert Hamilton, the immediate younger brother of John, had died without issue; and as John himself had no children, the party who was next entitled to succeed to the estate (on the supposition that Sir Hew and his heirs had no right) was the appellant Mrs. Fullarton, the heir and representative of their eldest sister, who was daughter of Joanna Hamilton.

Sir Hew died in 1790, leaving a son, Sir Hew, (the second;) and in 1793 Mrs. Fullarton raised an action of reduction against John Hamilton, and against Sir Hew, (the second,) calling for production of the deed of repudiation of 13th August 1740, the decreet of declarator obtained by John Hamilton in 1741, his general service, and charter and sasine, together with the disposi-

tion executed by him in June 1780, and the sasine thereon; and concluding that they should be reduced, as being contrary to the entail, and that, being so reduced, it ought to be declared that the late Sir Hew Dalrymple, 'by his assuming and bearing the 'name and arms of Hamilton of Bargany, upon obtaining the 'judgment of the House of Peers in his favour, and afterwards 'laying down and ceasing to bear and wear the said name and 'arms, &c., had forfeited the estate, or at least had lost and for-'feited it by the deed of repudiation; and that John Hamilton, 'by the manner in which he made up his titles, or by executing 'the deed of 1780, or by the one or other of these acts and deeds, 'the said John Hamilton, defender, has contravened the said 'deed of tailzie, incurred an irritancy of, and amitted, lost, and 'forfeited his right and title and interest to the whole entailed 'lands and estate of Bargany, &c., for himself and the descend-'ants of his body;'—'and that the said pursuer ought to be 'served heir of tailzie and provision to the said James Lord Bar-'gany in the said lands and estate of Bargany.' July 26. 1822.

In defence against this action John Hamilton founded on his charter and sasine in 1742, with forty years possession, as a sufficient title to exclude, and therefore opposed great avizandum being made. On the other hand, Mrs. Fullarton contended that she had been in minority during the greater part of that period, and therefore prescription had not run. To this it was answered by John Hamilton, that the exception of minority did not apply in the case of entails, because any one of the substitutes was entitled to have objected to the deeds; and if such a plea were sustained, prescription could never run against an entail. Lord Justice-Clerk Macqueen found, 'That, in computing the period 'of prescription, the years of the pursuer's minority are not to be 'deducted; and in respect that the charter and sasine 1742 are 'ex facie unexceptionable, and that no nullity or objection does 'from thence appear to lie against them, and that it is averred 'by the defender, and not denied by the pursuers, that the de-'fender has, in virtue of that investiture, possessed the estate of 'Bargany from the date thereof to the commencement of the pre-'sent action, without any challenge or interruption, finds that the 'defender's right to the estate is secured to him by the positive 'prescription, and that he is entitled to hold and possess the 'estate under the foresaid investiture in time coming, and that 'the same is sufficient to exclude the title of the pursuers in this 'reduction; and therefore alters the former interlocutor, and 'assoilzies from the reduction; reserving to the pursuers to in-'sist in the declaratory conclusions of their libel, and particularly

July 26. 1822. 'how far the tailzie 1688 is affected by the investiture 1742, and 'whether or not the defender has incurred any irritancy under 'that entail.' Against this judgment Mrs. Fullarton having reclaimed, the Court found, 'That in this case, in computing the 'period of prescription, the years of the pursuer's minority are to 'be deducted; and therefore that the defender has not produced 'a sufficient title to exclude.'

Immediately after this judgment, John Hamilton having died without issue, and Sir Hew the second being also dead, appearance was made by the present respondent, his eldest son, who reclaimed; but the Court, on the 6th of December 1796, adhered.* He then appealed to the House of Lords, by whom it was ordered, on the 18th December 1797, 'That the cause be remitted 'back to the Court of Session in Scotland to review the interlocu- 'tors appealed from, and to consider how far the validity of the 'title to exclude, set up by the defender (Sir Hew,) is in this case 'involved with the title set up by the pursuer to sustain the ac- 'tion of reduction and declarator, as having become the nearest 'substitute under the deed of entail, in the manner alleged in her 'behalf; and if the Court shall hold these questions to be in this 'case involved with each other, that they do pronounce an inter- 'locutor for or against that title, and also on the effect which such

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* See Mor. *voce* Prescription, p. 11171. In the Respondent's Case, p. 7. the following explanation of the judgment is given:—'The Judges were unanimously of 'opinion in favour of the interlocutor of the Lord Ordinary, and held it to be clearly 'established in law, that the character of a substitute, under which the appellant 'claimed, did not entitle her to have her minority deducted from the years of pre- 'scription. But when judgment was about to be given, it was for the first time sug- 'gested, on the part of the appellant, that a distinction might be traced between her 'situation and legal character under the entail of Bargany, and that of a substitute, 'as to which character it had been found by many adjudged cases that minority 'could not be pleaded. She asserted that in *this preliminary stage of the cause*, in 'arguing her objection to the exclusive title, she was at liberty to assume as true, 'not only all the facts alleged in her summons, but all the conclusions in law which 'were there deduced from them; in other words, that she was entitled hoc statu to 'hold that Mr. Hamilton and his brother, the late Sir Hew Dalrymple, had incur- 'red fatal irritancies and contraventions, and had forfeited for themselves and their 'descendants, by which, in terms of the tailzie, and without the necessity of any 'declarator, she had become ipso facto the next heir of entail, and the estate had 'fallen and accreseed to her as next heir, in the same manner as if the persons con- 'travening, and their descendants, were naturally dead. From the moment of these 'contraventions, she maintained that she acquired a right of eviction, not contin- 'gent, but immediate; and therefore, although certain legal forms of declarator and 'service were requisite to establish her title and put her in possession, she had all 'along been the owner (vera domina) of the property, and as such entitled to plead 'her minority in bar of the prescription running against her. Instead of proving 'her allegations of contravention and irritancy, she maintained that she was entitled 'to assume them, because she had set them forth in her summons.'

'judgment may have upon the interlocutor directed to be re- July 26. 1822.
'viewed.'*

In consequence of this remit, the Court, on the 23d of November 1798, 'altered their former interlocutor, sustained the title 'produced by the defender as sufficient to exclude the pursuer's 'title, and assoilzied the defender from the conclusions of the re-'duction.' In reference, however, to a separate action of reduction, of a supplementary nature, and the conclusions of declarator, they found, on the 8th December 1798, 'That it is still en-'tire to the petitioner (Mrs. Fullarton) to insist in the separate 'action of reduction and declarator, and remitted to Lord Arma-'dale, in absence of Lord Justice-Clerk, to hear the counsel of 'the parties,' &c. Lord Armadale thereafter found, 'That the 'defender had, in this and the previous action, to which the pre-'sent has reference, produced and referred to preferable and ex-'clusive titles to the lands claimed by the pursuer;' and therefore assoilzied the defender.

Against these judgments Mrs. Fullarton appealed, and on the 3d of June 1801 the House of Lords ordered and adjudged 'that 'the said interlocutors complained of in the said appeals be, and 'the same are hereby reversed; and it is declared and found, 'that the matters in the appellant's summonses complained of are

* In the Respondent's Case, p. 8. it is stated, that, in proposing the above remit, Lord Thurlow expressed himself to this effect, and that the Lord Chancellor Loughborough concurred in his observations:—'In the singular way in which this cause 'has been taken up in the Court below, what can this House do? What has Mrs. Ful-'larton to complain of? Whether Sir Hew Dalrymple and his family, or Mr. Ha-'milton, took first or last, seems jus tertii to her. Sir Hew, she says, forfeited. It 'is necessary that this should be judicially declared. Can it be declared now that 'he is dead? Professes to have great doubt if it could. Entertains much doubt if 'the repudiation can infer a forfeiture. Mrs. Fullarton calls it a disposition to 'John Hamilton, an extraneous person; and next, when she wants to be rid of him, 'she says he forfeited, because he was an heir who accepted of the repudiation. 'Her plea must be referred to her summons. The decree finds her entitled to de-'duct her minority, because she became next substitute. How did the Judges who 'were for this decree find out that she was next substitute? They assume it, it is 'said. If she had stated facts from whence that necessarily followed, he would 'have understood them; but as it is not a necessary inference from the facts alleged '—as that is a point yet to be discussed—a point of law not decided by the Court 'below—his Lordship said he was not prepared to pronounce, nor did he think this 'House could pronounce, or hold her to be the nearest substitute. Before doing 'so, their Lordships must be satisfied that she has stated enough to prove it; and 'as this has not been decided upon yet by the Court below, the appellate jurisdic-'tion cannot interfere. Every thing in law has been waived or assumed by the 'Judges who were for Mrs. Fullarton, where they ought to have assumed nothing 'but facts. He therefore concluded by proposing that the cause should be remitted, 'in order that the Judges might boldly and plainly state the legal principles appli-'cable to the facts stated, on which the decision of it should be ultimately rested.'

July 26. 1822. 'not sufficient to sustain the conclusions in these summonses, or 'any of the said conclusions; and therefore assoilzied the de-'fender.'*

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* In moving this judgment, it is stated in the Respondent's Case, p. 9. that, according to a note taken at the time by the Appellant's solicitor, the Lord Chancellor made the following observations in reference to the form of requiring a title to exclude to be exhibited, where no sufficient title was shown on the face of the summons:—
'If the title set out by the pursuer were in fact no title, it did not occur to me then, 'nor does it now, that there would be any inconvenience in going into a discussion 'of that title. If it appears that the pursuer has a title, then you may go into the 'defender's exclusive title; but why is the defender to be obliged to argue a plea 'in bar for ten long years, as in this case, if the pursuer has not stated a title to 'enable her to maintain the action? It often happens in this country that the 'plaintiff states facts, (which may, however, be untrue,) and the law founded neces-'sarily on these may be such, that the defendant can only perhaps with propriety 'rest his defence on a plea in bar. In the Court of Chancery here, what is termed 'a fishing bill is often filed, where the plaintiff, stating himself to be an heir at law, 'claims to see the title-deeds by which the defendant holds the property which 'belonged to the plaintiff's ancestor. The Court must take this title to be good in 'the first instance; and if an exclusive title or deed, for instance, with sixty years 'possession, be set up, the Court will then go into that exclusive title; but if the 'defendant say to the plaintiff, Your facts form no title against me the defendant, 'nor anybody else, the defendant has a right to demur to the action; and if there 'be nothing in the plaintiff's case, of course the Court never comes to the defend-'ant's. It becomes me to say, that such a practice is founded in reason, and was 'in your Lordships' view when you sent back the former appeal to the Court of 'Session.

'The remit was in these words'—[Here his Lordship read the same.]

'The meaning of this was, that the Court should consider how far the title to 'pursue, set out by the pursuer, was involved with the title to exclude, set out by 'the defender. If the pursuer's title was invalid, of course they were not involved; 'if there was a valid title in the pursuer, then they were involved: in that case it 'was necessary to inquire into the pursuer's title, whether she was the nearest or a 'more remote substitute, and whether she had a right to deduct her minority or 'not; and if a contravention had been committed by the defender's authors, the 'Court was to consider what was the title of the pursuer by such contravention at 'this day. It was thus your Lordships' intention that the Court should first consi-'der if the pursuer had a title, and afterwards, if necessary, consider the exclusive 'title under the prescription.

'In this shape the cause went back to the Court; and I can scarcely find words 'to do justice to the elaborate consideration given to it in the Court below. Every 'question arising on this point has been searched to the bottom, and decided upon 'in fact; but the cause has been returned here with an interlocutor, saying no more 'than that the exclusive title is good, which seems to admit that the pursuer had a 'title of some kind or other.

'But this is no answer to your Lordships' remit—no answer to the question, 'whether or not the pursuer has a title. You cannot imply from this answer whe-'ther a contravention has been committed or not—whether or not that contraven-'tion be purgeable—whether it can now be declared or not against the heirs of the 'alleged contraveners—whether the repudiation was a disposition or not—whether 'it was a contravention or not, and to be followed by forfeiture; nor whether any 'one of the acts and deeds of Sir Hew, or of John Hamilton, were contraventions 'or not.

No further steps were taken by Mrs. Fullarton in relation to this matter till 1814, when the respondent Sir Hew having applied for an act of Parliament to sell part of the estate of Bargany, she appeared and made objections; in consequence of which it was declared, that nothing contained in the act should affect her claim, or that of any other heir of entail, to the estate of Bargany, if they any had. She then, with the view of trying the question of right to the estate, granted to Mr. Thomas Martin, writer in Edinburgh, a trust-bond for one million sterling, on which he raised an action of adjudication, and obtained decree from Lord Pitmilly; but his judgment was brought under review, and the proceedings were afterwards superseded till the issue of a reduction which she raised, calling for exhibition of the deed executed by John Hamilton in 1780, and of the titles made up by Sir Hew, founding on that deed, and concluding for reduction of them. Her main reason of reduction was, that in consequence of the deed of repudiation executed in 1740, with the charter and sasine of 1742, and the death of John Hamilton and Dr. Robert Dalrymple without issue, she had right to the estate by virtue of the original entail 1688, and it was ultra vires of John Hamilton to execute the deed of 1780. She therefore concluded to have it found, 'that the said John Hamilton, by 'claiming, acquiring, and accepting of the said estate of Bar-'gany, and entering into and holding possession of it under 'the settlements and titles foresaid, was personally under a le-'gal obligation to implement and perform all the conditions 'and provisions, and was subject to all the clauses, prohibitory, 'irritant, and resolutive, contained in the said entail of 1688, and 'which had been recognised and repeated, at his own instance, 'as obligatory by the charter 1742, and infeftment thereon, and 'by the charters granted as aforesaid by John Earl of Cassillis July 26. 1822.

'The Court were all of opinion, either that there had been no contravention—'that such contravention was purgeable, or that no declarator could be brought at 'this time of day; and that the change of situation between the two prior heirs was 'no injury to the appellant, who stands precisely in the same situation as if no such 'change had taken place. They seem unanimous, with the exception of one Judge, 'who says nothing on the subject, that the pursuer had no title.

'After the most painful attention to this cause, and to the authority of the dead 'as well as of the living, I cannot represent the pursuer to your Lordships as having 'a title. It has thus appeared to me to be my duty to detail the circumstances of 'the case, to show, in my opinion, how the Court has failed in giving a proper 'answer to the remit. As, after the most anxious attention, I cannot be induced to 'think that Mrs. Fullarton has set out a sufficient title, I conceive that it will be 'necessary that your Lordships should make some declaration upon this subject. I 'therefore submit to your Lordships, that the interlocutors complained of ought to 'be reversed, and a declaration made, that the premises set out in Mrs. Fullarton's 'summonses do not sustain the conclusions of these summonses.'

July 26. 1823. ‘ and Sir John Whitefoord, and infeftments thereon; and more ‘ particularly the said John Hamilton was under a legal obliga- ‘ tion to and in favour of all and each of the substitutes in the ‘ said contract of marriage 1688, charter 1742, and other titles ‘ aforesaid, to suffer the succession of the said estate of Bargany ‘ to descend to the several substitutes, and their heirs successively, ‘ in the order therein pointed out, and to do no act, and grant no ‘ deed, whereby the same might be altered or innovated; which ‘ obligation every substitute has at common law a right to en- ‘ force. But, by the said disposition and new deed of tailzie of ‘ 21st June 1780, the said John Hamilton most improperly and ‘ fraudulently, to the prejudice of the pursuer, as next substitute ‘ heir of tailzie, and with a view to defeat her legal right, altered ‘ or attempted to alter the order of succession as fixed by the ‘ titles under which he himself held the estate of Bargany;’ that being a gratuitous deed, granted in fraudem of her rights under the entail, it was liable to reduction at her instance; and also under the act 1621, cap. 18, as a deed executed in favour of conjunct and confident persons, to the prejudice of her jus crediti under the entail; and, lastly, ‘ The said deed 1780 having been ‘ granted by the said John Hamilton, contrary to and in violation ‘ of the conditions, &c. of the tailzie of Bargany, inasmuch as ‘ it imports an alteration, innovation, and change of the course ‘ and order of the succession thereby established, is null and ‘ void, in terms of the act of Parliament concerning tailzies in ‘ 1685, cap. 22.’

The declaratory conclusion as to her right was, ‘ That by the ‘ terms of the foresaid contract of marriage and deed of entail 1688, ‘ charter 1742, and infeftment thereon, expede by the said John ‘ Hamilton of Bargany, charters from John Earl of Cassillis and Sir ‘ John Whitefoord aforesaid, and infeftments thereon, the said ‘ Marianne Mackay Hamilton, pursuer, is next in the order of suc- ‘ cession, failing the said John Hamilton and the heirs of his body, ‘ and the said Robert Dalrymple and the heirs of his body; and ‘ they having accordingly failed, she has the only good and un- ‘ doubted right and title to be served heir of tailzie, under the ‘ said investiture, to the said John Hamilton of Bargany, to the ‘ exclusion of the descendants of the late Sir Hew Dalrymple, ‘ the eldest brother of the said John Hamilton; and that the ‘ said pursuer ought to be served heir of tailzie and provision to ‘ the said John Hamilton of Bargany in the said lands and ‘ estate of Bargany and others foresaid, after the form and tenor ‘ of the said deed of tailzie 1688,’ &c.

In defence against this action, the respondent Sir Hew contended that the judgment of the House of Lords in 1801 formed

a res judicata, and that the claim was not well-founded on the merits. July 26. 1822.

'On the other hand, Mrs. Fullarton maintained,—

'1. That the two actions were essentially different; that the former action proceeded on the assumption that John Hamilton and his brother Sir Hew, by the deeds of repudiation, and the charter of 1742, and the disposition of 1780, had contravened the conditions of the original entail, and thereby forfeited their right to the estate, so that she was entitled to succeed to it, and to be served to James Lord Bargany; whereas, in her present action, and conformably to the judgments which had been pronounced, finding that she had not shown sufficient grounds for setting aside these deeds, and that they were therefore to be held valid, she claimed the succession to the estate by virtue of these deeds, and as being the next heir-substitute after John Hamilton, in terms of the entail 1688, and to be served heir to him, and not to James Lord Bargany.

2. That her claim was well-founded on the merits;

First, Because, by the repudiation of Sir Hew in 1740, and the proceedings which followed, the succession had opened in favour of John Hamilton, and the heirs called posterior to him by the entail 1688; that such being the case, the succession could not revert to the prior class of heirs, of which the respondent Sir Hew was a member, but belonged to her, as the next heir of tailzie after John; and that the condition in the deed of repudiation in favour of Sir Hew and his descendants could not burden the succession, as it was not engrossed in the titles of the estate, and had never appeared on record.

Second, Because the devolution to the posterior heirs was fortified, both by the vicennial prescription of John Hamilton's retour, and by a prescriptive possession by him for more than 40 years on the charter 1742, by which he, and the heirs of his body, were called prior to Sir Hew, and thereby establishing, by prescription, the right of the posterior heirs to the exclusion of the prior branch; and,—

Third, Because she was the heir called under the charter 1742, in which the destination was 'aliis hæredibus quibuscunque' of the body of Joanna Hamilton, which necessarily meant the other heirs of her body of the same character as John Hamilton,—that is, heirs posterior to that class to which Sir Hew belonged.

By Sir Hew it was maintained,—

1. That the matters contained in the present summons were identically the same as those contained in the former one, seeing that, in both cases, Mrs. Fullarton maintained that Sir Hew, the brother of John, and his descendants, had forfeited their right to

July 26. 1822. the estate; and her object in both actions was to have it found that she had right in preference to them, in consequence of that forfeiture; but that the House of Lords had found, that the matters so stated in her original summons were not sufficient to entitle her to attain that object, and therefore decree of absolvitor was pronounced.

2. That on the merits Mrs. Fullarton was not entitled to prevail;

First, Because, as there was no declarator of forfeiture against his grandfather, Sir Hew, who had never made up titles under the entail, the rights of his descendants (who were heirs of entail, and did not represent him) could not be affected by his deed of repudiation; that, besides, as that deed contained an express reservation of their rights, and formed the ground of the decree of declarator—of the retour—and of the charter 1742, in which it was specially referred to, these deeds must be held to have been qualified by that reservation; and that although John Hamilton, a posterior heir, was allowed to possess the estate, yet it necessarily reverted on his death to the prior class, in the same way as in the case of the existence of a nearer heir, after a remoter heir has made up titles.

Second, Because John Hamilton's retour, describing him as second son of Joanna Hamilton, and as such nearest heir of entail, while his elder brother was alive, was thereby ex facie null, and so incapable of being prescribed; that, besides, the viennial prescription of retours was merely personal to the party served, and therefore could not avail Mrs. Fullarton; and that, supposing the destination of the charter 1742 called her preferably, still it was not fortified by prescription prior to the deed 1780, as thirty-eight years only had intervened, while, in consequence of intervening minorities, Sir Hew's right to reduce it, and the deeds on which it proceeded, had not been cut off by the negative prescription; and,—

Third, Because the 'other heirs whatsoever' of the body of Joanna Hamilton, mentioned in the charter 1742, meant all the heirs of her body, other than John Hamilton, and that of these Sir Hew was the eldest, and so entitled to succeed.

Lord Reston, 'in respect that the present process contains 'different conclusions, and is founded on different grounds from 'the former action, repelled the defence of res judicata; but on 'the merits, in respect of the terms of the charter and infeftment 'in 1742, with reference to the deed of repudiation therein con-'tained, and the reservation in the said deed of repudiation, found 'that the defender is the heir entitled to possession of the lands in 'question under the said charter and infeftment and subsequent

'titles, and therefore sustained the defences, and assoilzied the de- July 26. 1822.
'fender from the conclusions of the libel.' Both parties having represented, his Lordship adhered to his judgment, as to the defence of res judicata, 'but on the merits, found that the defender 'is the person now alive who would have been entitled to possession, had the right rested on the entail 1688 alone; that it is 'not, and cannot now be competently pretended that he has incurred any forfeiture, in consequence of the temporary repudiation granted in favour of John Hamilton; that the defender 'is the heir entitled to possession, under the appropriate and 'technical meaning of the investiture 1742, taken per se; and that 'his predecessor is nominatim called in the investiture 1780;' and therefore on these grounds adhered to his interlocutor, assoilzieing Sir Hew. Both parties reclaimed, but the Court, on the 21st May 1818, refused both petitions.*

Separate appeals were then entered to the House of Lords by Sir Hew as to his defence of res judicata, and by Mrs. Fullarton on the merits.

After hearing parties, the House of Lords found, 'That the 'judgment of this House, on the 3d of June 1801, in the matter 'of the petition of appeal then before the House, in which the pre'sent appellant, then the wife of Colonel William Fullarton, and 'the said William Fullarton, were appellants, and Sir Hew Dal'rymple Hamilton, Bart. was respondent, whereby it was declared 'and found, that the matters in the then appellants' summonses 'were not sufficient to sustain the conclusions in those summonses, 'or any of them, and therefore this House assoilzied the defend'ers, appears to have proceeded only on the insufficiency of the mat'ters in those summonses to sustain the conclusions therein; and 'find, that such judgment therefore did not affect the rights of the 'appellant in any future action, founded on other grounds of 'action; and the Lords further find, that the action of the appel'lant, which is the subject of the petition of appeal now before the 'House, is founded on the decreet of declarator of the 25th of 'February 1741, the retour of service, in pursuance of such de'creet, finding John Hamilton, second son of Robert Dalrymple, 'procreate of the body of Joanna Hamilton, the lawful and nearest 'heir of tailzie and provision to James Lord Bargany, deceased, 'according to the matrimonial contract of 19th June 1688, and 'under the charters of resignation obtained by the said John 'Hamilton, by virtue of the procuratory of resignation contained

* Not reported.

July 26. 1822. ‘ in the said matrimonial contract, by which charters the lands ‘ and barony of Bargany, and other lands therein mentioned, ‘ were granted to the said John Hamilton, by the description of ‘ second son of Robert Dalrymple, procreate between him and ‘ Joanna Hamilton, and so heir-female of John Lord Bargany, ‘ and the heirs whatsoever of the said Joanna Hamilton's body; ‘ whom failing, to the other heirs whatsoever of the body of the ‘ said Joanna Hamilton, procreated between her and the said ‘ Robert Dalrymple, without division; and the appellant, by her ‘ summons, now insisting that the said John Hamilton was, at ‘ the time of his death, seised of the lands in question, to hold to ‘ him and the heirs of his body, according to the limitations in ‘ the said marriage-contract of the 19th June 1688, and the sub- ‘ sequent heirs of entail called to the succession after him, and ‘ the heirs of his body, by the terms of such marriage-contract, ‘ in exclusion of Sir Hew Dalrymple, deceased, the eldest son of ‘ the said Robert Dalrymple and Joanna Hamilton, and the heirs ‘ of his body; and that, according to the true construction of the ‘ said charter of resignation and investiture of the 23d August ‘ 1742, and by virtue of the limitation therein contained, on fail- ‘ ure of the said John Hamilton, and the heirs of his body what- ‘ soever, to the other heirs whatsoever of the body of the said ‘ Joanna Hamilton, procreated between her and the said Robert ‘ Dalrymple, the succession under the said charters devolved to ‘ such a person as, under the said marriage-contract of the 19th of ‘ June 1688, was entitled to succeed to the said John Hamilton, ‘ and the heirs of his body, according to the order of succession ‘ prescribed by the said marriage-contract:—That is to say, the said ‘ Robert Dalrymple, the third son of the said Robert Dalrymple, ‘ the father, and Joanna Hamilton, and the heirs of the body of ‘ the said Robert Dalrymple, the son, whom failing, the said ap- ‘ pellant, as the next in succession to the said John Hamilton, and ‘ the heirs of his body, the said Robert Dalrymple, his brother, ‘ having died without issue in his lifetime; and that the appellant ‘ had the only right to be served heir of entail to the said John ‘ Hamilton, the last person seised of the said lands, under the ‘ said marriage-contract of the 19th of June 1688, and according ‘ to the true construction of the said charter of the 26th of July ‘ 1742, and other charters from subjects superiors, libelled on in ‘ this case; therefore the Lords find, that the judgment of the ‘ House, on the petition of appeal depending before the House ‘ on the 3d of June 1801, does not preclude or affect the question, ‘ whether the appellant is now entitled to claim the said lands ‘ according to the title insisted on by her summons in the action,

'which is the subject of her present petition of appeal; without pre- July 26. 1822.
'judice, however, to the right, if the respondent hath any, under
'the deed of repudiation of the 13th of August 1740, or the right,
'if any he now hath, to reduce the said decreet of the 25th of Fe-
'bruary 1741, or the retour of service in pursuance of such decreet,
'or the said charter of the 26th of July 1742, or the right, if any
'he hath, under the limitations contained in the said charter of
'1742, or under the deed of the 21st day of June 1780, or the
'infeftment of the 24th and 25th of October 1780, or under the
'other charters from subjects superiors, libelled on in this case;
'and it is ordered, that, with this finding, the cause be remitted
'back to the Court of Session in Scotland, and that the Judges
'of the Division to which this cause is remitted do require the
'opinions of the Judges of the other Division of the said Court
'in the matters or questions in this cause; and it is further ordered
'and adjudged, that the said cross appeal be, and the same is
'hereby dismissed this House.'

LORD CHANCELLOR. — My Lords, your Lordships' attention was lately called to a case of very great consequence—I mean the case of the Honourable Marianne Mackay Hamilton Fullarton, widow of the late Colonel William Fullarton of Fullarton, appellant, Sir Hew Dalrymple Hamilton of North Berwick, Baronet, respondent. There were in this case an appeal and a cross appeal.

My Lords, the matter to be decided under the original appeal is the right of succession to the entailed estate of Bargany in Scotland—Mrs. Fullarton claiming that estate in the manner in which I shall have occasion to state to your Lordships presently,—Sir Hew Dalrymple Hamilton insisting that he is entitled; and the case before your Lordships is a case of very great importance, both with respect to the value of the property, and the doctrine which must be applied for the decision of the question between the parties.

My Lords, there was a contract of marriage and entail of the 19th of June 1688, and the parties to that contract were John Master of Bargany, and his father, John Lord Bargany, of the one part, and Mrs. Jean Sinclair of the other part.—[His Lordship then read the terms of the deed, see p. 265.]

The contract of marriage contains a procuratory authorizing resignation of the lands into the hands of the superiors, for new infeftment in favour of John Master of Bargany, and the heirs of tailzie substituted to him; and it also contains all the provisoe, conditions, restrictions, and clauses irritant and resolutive, necessary for constituting in Scotland a strict and effectual entail. Those clauses it will be hardly necessary I should detail to your Lordships.

John Master of Bargany died before his father, leaving an only daughter, Joanna, who, in the year 1707, intermarried with Robert Dalrymple of Castleton, and from that marriage both these parties are stated to be

July 26. 1822. descended. John Lord Bargany was succeeded by his second son, William. He made up titles to the estate, by service and retour, as nearest and lawful heir-male of John Lord Bargany, his father. Upon the 27th of July 1694 the entail was registered; William Lord Bargany was served heir of entail in 1709; he was succeeded by his son James, who was the fourth Lord Bargany; he was served heir of tailzie on the 12th of July 1712; and at his death there was a competition for the estate, the particulars of which are stated very much at length in the papers which have been laid upon your Lordships' table, but which was finally decided in favour of the descendants of Joanna Hamilton. My Lords, these papers proceed afterwards to state the entail that was made, in a contract of marriage between Robert Dalrymple and Joanna Hamilton, of an estate which, your Lordships will recollect, has been designated throughout this case by the name of the North Berwick estate. Joanna Hamilton married in 1707 with Robert Dalrymple, who was the eldest son of the Lord President of the Court of Session of that day. It appears, by the instruments which are before your Lordships, that it was apprehended that the heir of that marriage might succeed to the estate of Bargany, while, at the same time, he would be the heir of line of the Lord President, Sir Hew Dalrymple, and thereby heir to the estate of North Berwick. If this event should occur, the name and family of Dalrymple of North Berwick would, in terms of the entail of Bargany, that is, by virtue of those clauses, merge and be lost in that of Hamilton of Bargany, because the heir of Bargany was bound by the entail of that estate to bear the name and arms of Hamilton of Bargany. My Lord President seems to have been anxious to prevent this, and therefore, as it is stated in the contract of marriage, bearing date the 20th of March 1707, entered into between his eldest son Robert Dalrymple and Joanna Hamilton, to which the Lord President Dalrymple was a party, the lands of North Berwick were settled on Robert Dalrymple, and the children of the marriage, and divers other substitutes, by strict entail, (reserving the liferent to the Lord President); but, at the same time, to prevent the name and family of the Lord President, Sir Hew Dalrymple, from being sunk in that of his daughter-in-law, the marriage-contract bears this recital,— 'That it was expressly designed, communed, and agreed upon, that my 'said estate, name, and arms, shall be preserved distinct and separate 'from the family of Bargany.' It likewise contains this express proviso— [His Lordship then read the clause against the union of the two estates, and the reserved power by the Lord President, see p. 267.]

Sir Robert Dalrymple, the institute in this entail, is stated to have survived his wife Joanna Hamilton, and died in 1734; but he predeceased his father, the Lord President. In respect of the descendants of this marriage, it is stated that there were issue three sons and two daughters; first, the late Sir Hew Dalrymple of North Berwick, and who died in December 1790, leaving an only son, the father of Sir Hew, party in the present appeals; secondly, John Dalrymple, who came to possess the estate of Bargany in the way I shall mention to your Lordships presently,

and assumed the surname of Hamilton of Bargany, but had no issue; thirdly, Robert Dalrymple, doctor of medicine, who died many years ago without issue; fourthly, Marion Dalrymple, who was married to Donald Master of Reay, by whom he had two sons, the eldest of whom, George, became Lord Reay. This nobleman died without male issue, but left two daughters, of whom the Honourable Marianne Mackay Hamilton Fullarton, party in the present appeals, is the eldest. Fifthly, Elizabeth Dalrymple, who married Mr. Duff of Crombie, by whom she had two daughters, the youngest of whom was married to Sir Hew Dalrymple, the father of the present Sir Hew, party in these causes, and the grandson of Sir Robert Dalrymple of Castleton. July 26. 1822.

After the death of his eldest son, the Lord President, in virtue of the reserved powers in the last-mentioned marriage-contract, executed a deed in 1784, permitting his grandson, Hew Dalrymple, to serve himself heir of tailzie to his father in the lands of North Berwick, without inserting in his service the clauses in the said contract concerning the succession to the estate of Bargany. At this time the grandson was presumptive heir to the estate of Bargany; and in two years afterwards the succession opened to him, as already mentioned, by the death of James last Lord Bargany without issue.

My Lords, in the year 1786, the Lord President, in further exercise of his reserved powers, executed two deeds, which are stated in the proceedings. The first is dated the 8th of April 1786, the second the 9th of April 1786. The first recites the parts of the two entails of North Berwick and Bargany which it was necessary to recite.—[His Lordship then read the clause permitting Sir Hew to serve himself heir to the estate of Bargany, see p. 269.]—I beg your Lordships' attention to the following words; and although it may seem in some respect loss of time to read these instruments of the Lord President, it appears to me it really is not so, and that a good deal of argument may be derived from the manner in which the Lord President thought the estates were to be dealt with, in case they were held together: He says, 'That in order that 'the said Hew Dalrymple be enabled so far to accept of the succession 'to the estate of Bargany, as to be served and retoured heir of tailzie to 'that estate, and thereby be in a condition to denude himself thereof in 'favour of the next person after him called to the succession by the tail-'zie of the said estate of Bargany, which is the most regular and effectual 'manner of conveying the said estate in favour of the next person in the 'line of succession by the tailzie of the said estate of Bargany.'—Your Lordships see, that that which is laid down is, that Hew should be served and retoured heir of tailzie to that estate, and then denude himself, not by a deed of repudiation, but quite in a different way.—'I am therefore 'resolved so far to exercise the powers and faculties reserved to me to 'alter, innovate, qualify, revoke, or discharge the clauses and provisions 'contained in the contract of marriage last mentioned, as to enable the 'said Hew Dalrymple to accept of the succession to the estate of Bar-

July 26. 1822. 'gany, and to obtain himself served and retoured heir of tailzie to the 'said estate.'

Upon the 9th of April 1736, that is, the day after he had executed this deed, he says, noticing the entail to which I have referred your Lordships—[His Lordship then read the clause quoted ante, p. 270.]—I observe, as I pass on, that here the other heirs, the 'aliis hæredibus quibus-'cunque' in this deed,—at least the deed which speaks of Hew denuding himself of the estate,—must be heirs, not in the strict sense of the word, but those other heirs who were to succeed according to the limitations of the tailzie, the conditions of which are no further material than what I have now stated. The object of those deeds was to enable Hew Dalrymple, the eldest grandson of the Lord President, to make up titles to the estate of Bargany, and to retain possession of it during his grandfather's lifetime; but, at the same time, to impose upon the same eldest grandson an obligation to relinquish it in favour of the next heir of tailzie upon his grandfather's death.

My Lords, it appears that the grandson, in consequence of the permission granted by his grandfather, entered to the possession of the estate of Bargany as heir of tailzie to James last Lord Bargany. On the 9th of April 1736 he assigned the rents for certain purposes to James Craig, and, on the 13th of the same April, he granted a factory to John Kennedy, who was removed, and another factor appointed about three years thereafter. At the period now alluded to the litigation was going on, which has been already mentioned, concerning the right of succession to the estate of Bargany. That was at last terminated in the manner stated in these papers by the judgment of this House. It does not appear to be necessary to state to your Lordships the proceedings;—it is enough to say, that it ended in favour of Sir Hew Dalrymple.

My Lords, the estate of North Berwick was probably the most valuable of the two, and Sir Hew resolved to take that estate, and to reject the estate of Bargany; and the next question was, In what way John Dalrymple, who now assumed the name of John Hamilton of Bargany, should make up titles to that estate so as effectually to vest himself, and to divest his elder brother? They did not follow the mode prescribed by the Lord President in the deed I have stated, but, on the 13th of August 1740, a deed (which is known in these proceedings by the title of the Deed of Repudiation) was executed; and whatever the disposition in the other instruments may be, it is not at all material to be considered in this case. With respect to this deed, known by the name of the Deed of Repudiation, one material question arises upon what is the effect of it. It recites the entail of the estate of North Berwick, and the clauses contained in it relative to the estate of Bargany. It next mentions the competition which had occurred upon the death of James Lord Bargany; it refers to the judgment which I have last mentioned, and then it goes on in this way—[His Lordship then read the clause quoted at p. 271.]

The recital, your Lordships observe, speaks of what would be the consequence if he had now taken the succession; it speaks also of his mo-

July 26. 1822.

tive, that he would forfeit to John Dalrymple, and it speaks of his intention to permit the estate to be taken by John Dalrymple; but when he comes to state what is to be the effect of this repudiation, he expresses himself thus:—'And I consent that the said John Dalrymple shall, in 'respect of my repudiation as aforesaid, serve himself heir of tailzie and 'provision to the said James Lord Bargany, and otherwise make up titles 'in his person to the said estate of Bargany in such manner as is compe-'tent of the law, and as he shall be advised; and that the said John Dal-'rymple do instantly take possession of the said estate of Bargany, and 'uplift the rents thereof in the tenants' hands fallen due since the death 'of the said James Lord Bargany, and in time coming; providing al-'ways'—He has spoken of nobody to take, your Lordships observe, except John;—he has not spoken of the heirs of the body of John in any thing I have yet read;—he has not spoken of Robert in any thing I have yet read;—nor has he spoken of the heirs of Robert in any thing I have yet read; but he adds,—'providing always, that these presents shall no-'wise prejudge my own or my descendants' our right to take the succes-'sion of the said estate of Bargany upon failure of the said John Dalrymple, 'and Dr. Robert Dalrymple, my third brother, and their descendants.' There he includes the descendants of John, whom he had not before mentioned, and Robert, and the descendants of Robert, whom he had not before mentioned. Here are two events in which he provides that his right and the right of his descendants shall not be prejudged, namely, on the decease of John and failure of the heirs of his body, and Robert and failure of the heirs of his body; but there is a third case in which he also reserves to himself this right: 'Or in case any event shall exist in 'which I or my descendants can take the said succession, consistent with 'the foresaid tailzie of the estate of North Berwick, with which express 'provision thir presents are granted by me, and accepted by the said 'John Dalrymple.' Whatever the effect of this deed taken strictly may be, the meaning of it (whether it can be established is another question) is, that he should have the estate again if John died without issue, but not then if Robert was living or his issue, unless some event had happened in virtue of which he was entitled to hold both estates together; as, for instance, if the fetters on the North Berwick estate were worn off, or by any act he had done, and prescription following on that act, those fetters had been in any way destroyed, that then he might have said that that would be the effect of carrying this with the consequences he meditated; that he might have said to John if alive, You will be so good as to quit the estate; or to the heirs of his body, You will be so good as to quit the estate; and that he meant to reserve to himself the power of using that language to John and his issue, and to Robert and his issue. My Lords, for the sake of repeating what I myself stated in 1801, it wanted more of principle or authority than I have yet seen for saying that this is not such an alteration and innovation of the tailzie of the estate, as to make it at least extremely questionable whether it is right.

My Lords, this deed does not take any notice of the deeds executed

July 26. 1822. by the Lord President; and it appears that this deed of repudiation was not registered, nor does any instrument that I see record this proviso.

My Lords, this deed of repudiation having been obtained, the next proceeding which it is material to attend to is a process in the Court of Session, and a decreet of declarator obtained upon it in 1741 by John Hamilton against his elder brother, who is made a party to it, and some of the other substitutes in the entail of Bargany of 1688. My Lords, I shall not detail to your Lordships the very terms of that process of declarator, but they must be very carefully attended to. My Lords, no appearance was made for any of the defenders, and the decree, which was made in absence, was upon a prayer 'that it ought and should be found 'and declared, by decreet of the Lords of Council and Session, that the 'said John Hamilton, pursuer, hath the only right and title to the succession to the said estate of Bargany, and that he ought to be served 'heir of tailzie and provision to the said James Lord Bargany;' and the decree bears, that the Court found the points and articles of the summons relevant and proven by the writs produced, and found, and decerned, and declared, conform to the conclusions of the libel. My Lords, after that he expeded in 1741 a general service as nearest heir of tailzie and provision to James Lord Bargany. The retour of that service is stated at length in the papers before your Lordships, which retour must be also carefully borne in mind.

My Lords, this entail of Bargany stood, as I understand, upon a personal title, until John Hamilton caused the procuratory of resignation to be executed, and the lands were resigned into the hands of the superior in favour of John Hamilton, and he obtained a charter under the Great Seal of the Prince of Scotland of that part of the estate of Bargany which is freehold. This charter bears date the 26th of July 1742; the dispositive clause of the charter is thus expressed:—'Dilecto nostro Joanni 'Hamilton de Barganie, jurisconsulto, filio secundo demortui Domini 'Roberti Dalrymple de Castleton, procreat. inter illum et demortuam 'Dominam Joannam Hamilton, unicam filiam demortui Joannis Magistri 'de Barganie, et sic;'—that is, it styles him expressly to be second son, 'et sic,' and so the heir-female of the deceased John Lord Bargany,—'et 'hæredibus quibuscunque ex corpore dict. Joannis Hamilton; quibus de-'ficientibus,' (and those are the most important words, as it appears to me, that can be stated in the whole of the controversy), 'quibus deficien-, 'aliis hæredibus quibuscunque ex corpore dict. Dominæ Joannæ Hamil-'ton, procreat. inter illam et dict. Dominum Robertum Dalrymple, absque 'divisione.' Then he goes on to speak of the other heirs of tailzie; and concludes, 'Quibus deficientibus, hæredibus masculis ex corpore nunc de-'mortui Domini Joannis Houston,' who was the person to whom the limitation was made in the entail at the period of 1688,—that part of the entail at which I stopped in my recital to your Lordships.

My Lords, you will see in the printed papers what is called the Quæquidem of the charter, and which calls for careful attention. This charter contained all the prohibitory, irritant and resolutive clauses and conditions

contained in the original tailzie of 1688; and in virtue of this charter John Hamilton took infeftment on the 23d of August 1742, and his sasine was registered on the 20th of September afterwards. There were other charters which he took of other lands containing the same description of destination from subjects superiors. July 26. 1822.

My Lords, this charter of 1742 having been executed, in which these words occur which I have stated to be words of so much importance, 'Quibus deficientibus, aliis hæredibus quibuscunque ex corpore dict. 'Dominæ Joannæ Hamilton, procreat. inter illam et dict. Dominum 'Robertum Dalrymple, absque divisione,'—it is insisted before your Lordships, on the one side, that is, on the part of Sir Hew, that the 'aliis 'hæredibus quibuscunque,' who were to succeed on the failure of heirs of the body of John, mean Sir Hew. On the contrary, it is insisted, that as John, who was not himself an heir in the strict sense of the word, who is stated in this instrument to be the second son, and therefore it acknowledges the existence of a first son,—as John, therefore, was an heir of a particular species, and as John's sons might be heirs likewise of a particular species, so the 'aliis hæredibus quibuscunque' were such aliis hæredibus as John and his son were; and that Mrs. Fullarton, therefore, is the person to succeed upon the effect of those words, 'Quibus 'deficientibus,' &c.; that they were not meant to restore Hew and his descendants into that situation in the tailzie in which they stood under the settlement of 1688; but that—whether Hew himself, or any of his descendants, could or could not have reduced the charters, retours, &c.—whether this charter of 1742 was liable to challenge, or not liable to challenge—these words, 'Quibus deficientibus, aliis hæredibus 'quibuscunque ex corpore dict. Dominæ Joannæ Hamilton, procreat. 'inter illam et dict. Dominum Robertum Dalrymple, absque divisione,' were meant to create, as far as this charter could effectually create it, a destination to those who, subsequent to John, were to take under the entail of 1688, and not for the purpose of introducing anybody, who, under the entail of 1688, would not have taken after John. I repeat, the question proposed is, Whether it was the meaning of those words, as contained in this charter, to create a destination that would give to Mrs. Fullarton as the substitute, instead of reintroducing Hew or his descendants?

My Lords, John Dalrymple appears not to have liked to have trusted to that construction of the words, which supposes that these words would revest the estate in Sir Hew and his descendants; for having had possession from 1742, and having a service aided by twenty years prescription, in the year 1780 he executes a deed under which Sir Hew has made title; in which he says, 'Be it known to all men by these presents, 'me, John Hamilton of Bargany, Esquire, for certain causes and con-'siderations me moving, and in order to give effect to the entail executed 'by John Lord Bargany in his son's contract of marriage, of date the '18th November 1691, and to the conditions upon which my own right 'and title to the lands under mentioned was founded, to have given, 'granted, and disponed, likeas I hereby give, grant, and dispone to and

July 26. 1822. ‘ in favour of myself, and the heirs of my body, without division; whom ‘ failing, to Sir Hew Dalrymple, Bart. my brother, and the heirs of his ‘ body, without division; whom failing, to the next heirs of the body of ‘ John Lord Bargany aforesaid.’ Whatever John's pretence might be, this was not the way of giving effect to the contract 1688, since, according to the contract of 1688, Sir Hew Dalrymple ought to have taken before him, and before the sons of his body;—‘ whom failing, to Sir Hew Dal- ‘ rymple, Bart. my brother, and the heirs of his body, without division; ‘ whom failing, to the next heirs of the body of John Lord Bargany ‘ aforesaid, and the other heirs of tailzie contained in the foresaid deed ‘ of entail, in the order therein expressed.’ Now, my Lords, without entering at this moment into a discussion, whether the words ‘ Quibus ‘ deficientibus, aliis hæredibus quibuscunque,’ do or do not mean the persons who, under the deed of 1688, were to take next to John, if Robert died, as he did die in the mean time without heirs of his body; but, taking it for granted without discussion for the moment, that the meaning of that deed of 1742 was to limit to such heirs of entail as would have taken after John under the deed of 1688, according to the succession therein limited, the consequence of that would be, that the deed of 1780 would be in contradiction or contravention,—a word which I use now studiously, for the purpose of explaining what the former judgment of this House was when it spoke of contravention—this deed of 1780 would be a deed in contravention of the deed of 1742, for the deed of 1742 contained all the clauses prohibitory, irritant, and resolutive, to protect the deed of 1688; and if the words, ‘ Quibus deficientibus, aliis ‘ hæredibus quibuscunque,’ did not mean Sir Hew, but did mean Mrs. Fullarton, the consequence would be, that a deed, which attempted to introduce Sir Hew and his issue before Mrs. Fullarton, would be a contravention of that deed of 1742.

My Lords, this deed, it is stated, was not recorded in the Register of Entails. After this, in the year 1793, Mrs. Fullarton brought an action, and the proceedings in that action are stated at length in the papers, together with her summons. There was a second summons in the same year, which it is not important to mention; and after a great deal of proceeding in the Court of Session, the Lord Ordinary in that action pronounced, in 1794, this interlocutor—[His Lordship then read it, see p. 275.] —Your Lordships will permit me to call your attention to this reservation, ‘ Reserving to the pursuers to insist in the declaratory conclusions of ‘ their libel, and particularly how far the tailzie 1688 is affected by the ‘ investiture 1742, and whether or not the defender has incurred any irri- ‘ tancy under that entail.’ What this interlocutor states, therefore, is this: With respect to all the grounds of complaint founded on any thing which was done before 1742, that the deed of 1742, with the possession under it, gave the defenders an exclusive title; that whether Mrs. Fullarton had in that action, or had not in that action, a title to sue, it was quite unnecessary to agitate, because that deed of 1742, and possession under it, unless it could be made out to be a contravention in the man-

ner I will state by and by, had given the exclusive title to John Hamilton; and if it had given the exclusive title to John Hamilton as against Mrs. Fullarton, it was quite unnecessary in that action to consider what effect it had upon Hew; but there was the above reservation in respect of the deed of 1742, and you will see how that was rendered useless in consequence of what happened in this House. July 26. 1822.

My Lords, this interlocutor was brought under the review of the Court, and the Court afterwards proceeded to find, 'that, in computing the period 'of prescription, the years of the pursuer's minority are to be deducted.'

This came before the House of Lords in the year 1797, when your Lordships will recollect that though Lord Loughborough was then Chancellor, yet my Lord Thurlow was in the constant habit of attending the House on appeals; and it seems to have struck those two noble Lords,—and perhaps one ought to say struck them acting rather under the influence of ideas which prevailed in the English Courts of Justice, than under the influence of the practice of the Court of Session,—that it was a very strange course of proceeding to call on a defender in an action to prove that he had a title to exclude, which might be a discussion which would last for ten years; and if it was found at last he had not a title to exclude, they might then have to begin to see whether what we call the plaintiff, and which they would call the pursuer, had a right to bring the action at all; and therefore they thought it right to send it back to the Court of Session, 'to review the interlocutors that were appealed from, and to con-'sider how far the validity of the title to exclude, set up by the defender, 'is in this case involved with the title set up by the pursuer to sustain 'the action of reduction and declarator, as having become'—that is, the character in which she brought the action—'the nearest substitute under 'the deed of entail in the manner alleged on her behalf; and if the Court 'shall hold these questions to be involved with each other, that they do 'pronounce an interlocutor for or against that title,'—that is, the title to pursue,—'and also on the effect which such judgment may have upon the 'interlocutors directed to be reviewed.' My Lord Thurlow, as this Case represents, said, and it seems likely enough did say, that he was not at all prepared to pronounce that the then respondent was first substitute, without pronouncing that the matter of her libel made her so, and that the consideration of that point had been altogether waived.

My Lords, it went back to the Court of Session, and the Court of Session were to apply the judgment, as it is expressed, and on the 9th of March 1799 they pronounced this interlocutor, which was observed upon afterwards in this House, in the manner I shall mention: 'The Lord 'Ordinary having heard parties upon the conclusions of this action, finds, 'that the defenders have in this and the previous action, to which the 'present has reference, produced and referred to preferable and exclusive 'titles to the lands claimed by the pursuer; and therefore assoilzies the 'defenders from the conclusions of this action, and decerns, superseding 'extract till the 3d sederunt day in May next.'

My Lords, when it came back to this House, whether the Lords who

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cause of forfeiture of the estate, and the deed of 1780 as another contravention, and therefore a cause of forfeiture of the estate, it was quite impossible for her to turn round in the same action and say, Well, but if the deed of 1742 is not an act of contravention—if that deed of 1742 has given you, John Hamilton, a prescriptive title against me, because you have had possession so long,—then, failing you and your issue, if I am under the 'aliis heredibus quibuscumque,' the person next to succeed, I shall be entitled, under your own way of putting it, to say, If you have a title under that deed of 1742, I have a title under that deed of 1742,—not a title to turn you out of possession, but to succeed to you. When the case came up by appeal in the printed Cases, she insisted upon that right. Let us see what Sir Hew Hamilton says in answer to that: He says, that from the necessity of the case, as well as in consonance with her own summons, she was debarred from going into that question; that the distinct and primary object of that suit was to establish that there had been a contravention, and in consequence a forfeiture. Under the limitations of that investiture of 1742, if there was no contravention, she was not entitled to succeed to the estate when the interlocutor was pronounced in the Court of Session, because John lived for a few days after that interlocutor was pronounced by the Court of Session; but when she came to this House, if the deed of 1742 was no contravention—if that deed of 1742 created a new title, and she was entitled under that as to the 'aliis heredibus quibuscunque,' yet, as Sir Hew argued, that argument was quite foreign to the question in issue; and so it was foreign to the question in issue. And how was it possible for this House, on a summons which treated that deed of 1742 as a contravention, and therefore sought to forfeit Hew, and likewise to forfeit John,—how was it possible upon such a summons to permit her in that action, and with such a summons, to turn round and say, Now John is dead, I will not treat that as a contravention, but I will treat it as a ground of claim under this same summons, which abuses it as a contravention and a cause of forfeiture? I beg of the House of Lords to consider that as a ground of legitimate title. The House could do no such thing; and it could only give its judgment on the matters in the appellant's summonses, as not being sufficient to sustain the conclusions in those summonses, or any of them. The present action, as your Lordships will see, when I come to state the summons,—the present is an action which does not at all seek to disturb the late judgment of the House of Lords, or of the Court of Session; but it says, if that was not in issue in the former action, I put it in issue in this action, and I say this, after stating the title of 1688, and deducing the whole history of the thing from the beginning to the end, I must now admit John under the charter, and the effect of the proceeding in 1742 and time, had got a title as against me with respect to all the causes of quarrelling with it, which I stated in my summons in that former action; but when John set up that title against me, which by aid of prescription was good for him against me, then this question arises, if it was a good title for him against me, it must be a good title for me also if I am the person.

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July 26. 1823. entitled to take under it; and that brings the question to this: She says in this action, after John's death that charter of 1742 gives me a title—that I am the person to succeed to John. Sir Hew says certainly the contrary. You are not the person to succeed to John, for I am the person to succeed, on failure of heirs of his body. She says, that being the mode in which I claim, how is it possible the former judgment in the House of Lords can have any effect on my case? On the contrary, though I am unwilling to go the length of saying that the House of Lords then intended to express any opinion upon the point, I certainly may say that the judgment of the House of Lords was at least a careful judgment,—careful in this point, that it was not to prejudice any other claim she might have; and I might perhaps go a little further, and say that that judgment was drawn with a view to leave the present question open, if not to go the length of saying that it was a question which very well deserved to be considered, without saying one word more about it. Sir Hew says, You are not the person to take under that claim: I am the person. That is a question of construction. Then he says, But I am to take under the deed of 1780 at any rate, for I am there named. She argues, (I do not say how effectually, that is another question), if I make out that I am the person entitled under the deed 1742—that I was the person who, under the true construction of that deed, answered the description of 'aliis hæredibus quibuscunque,' that deed being fortified and secured by irritant, prohibitory, and resolutive clauses, I am entitled to say that the deed of 1780 ought not to stand in my way. Sir Hew says, I controvert that: I contend that, even if that was the effect of the deed of 1742, I am entitled under the deed of 1780.

Now, my Lords, when this came to be discussed before the learned Judges in the Court of Session, it does appear to me, I confess, that in a case of this great importance, of this great value, the thing has been almost entirely misunderstood, as to the meaning of this House. I do not mean to say what is the effect of it; but there is such a persuasion as to this in the mind of every learned Judge, not founded in fact, as may have influenced the judgment they have given. I mean to say that most respectfully. If that be so, we ought not to permit that to remain in their minds, and the effect of it to be felt by the parties. To show that this is the case, I will read to your Lordships, very shortly, the judgments those learned Judges have given.

My Lord Craigie says he is of opinion—and I need not trouble your Lordships with stating that, for all the learned Judges state that they are of opinion—there is no proper res judicata to exclude the action; and no person can read this paper, I think, without being of that opinion—he says, 'Although there may be a good deal in the determination of the 'House of Lords upon a great many of the matters now agitated, and al-'though I have a good deal of unwillingness to consider the matter still 'open, and although the case was so argued in the former proceeding, 'that the last finding in the House of Lords may go far to anticipate the 'result of the present plea, at the same time I say, if the case be still

'open, I should be of opinion that the Lord Ordinary's opinion upon the 'merits is not well founded.'—His judgment, therefore, as far as it goes, is for the pursuer. 'The charter of 1742, taken in connexion with the 'facts of the case.'—Very important words those are, because there may be a very great difference between the charter of 1742, taken per se, and taken in connexion with all to which that charter expressly refers; I do not mean taken in connexion with any thing dehors the charter, but taken in connexion with all to which it expressly refers. 'The charter' (his Lordship says) 'is to be considered as a charter following out the procu- 'ratory of resignation to which it refers. Sir Hew Dalrymple gave up 'his natural situation in the succession, and left room for those called 'after him in the entail.' Perhaps I may say, that probably there was a little haste in the expression I used so long ago as the year 1801, but which I cannot entirely get rid of now, that the proceeding in 1742 was a proceeding that might be considered as going upon the assumption of the fact, that Sir Hew and all his descendants were in their grave. His Lordship goes on to say, he 'gave up his natural situation in 'the succession, and left room for those called after him in the entail. 'The second son was entitled to succeed, upon Sir Hew declining to take 'the estate. The charter has reference to the decree of declarator, and 'it refers to the deed of repudiation. It is clear that Sir Hew had done 'that which deprived him of his situation in the succession. With 'regard to the reservation in the deed of repudiation, it reserved that right 'which was in him at the time, which was nothing at all; he had no right 'to do any thing which was inconsistent with his enjoying Barganny; the 'reservation could not preserve that which was actually given up. As to 'the deed 1780, it is of the nature of an alteration of the charter 1742. 'It is not yet recorded in the Register of Tailzies, so that this great 'estate is liable to be carried off for the debts of the defender. I think 'the lady is still entitled to succeed in preference to Sir Hew and his de- 'scendants; and, under all the circumstances of the case, I think the in- 'terlocutor of the Lord Ordinary upon the merits should be altered.' July 26. 1822.

My Lord Glenlee, after first stating his opinion that the interlocutor of the Lord Ordinary repelling the plea of res judicata is right, says, 'On the 'other hand, it is equally plain to me, that the defender in this process is 'entitled to found upon any judgment given by the House of Lords, to the 'effect of showing that the plea now maintained by the pursuer can- 'not be substantiated, and that there is no foundation for her claim, 'without taking for granted that the former judgment was wrong.' With humble deference to a Judge of great experience, and entitled to very great respect, it appears to me—at this moment I will not say whether the judgment was right or wrong—but it appears to me, with great deference to him, that the judgment in favour of Mrs. Fullarton, or against Mrs. Fullarton, might be right or wrong, without the least reference whatever to the former judgment in this House, which decides nothing upon the question raised by this summons. His Lordship then observes, 'Though 'there be no res judicata to bar the pursuer from being heard, yet if 'the pursuer's case, for its foundation, assumes that Sir Hew Dal-

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'rymple, by executing the deed of repudiation, forfeited for himself and 'the descendants of his body, if that be a necessary ground of the 'pursuer's arguments, then the defender is entitled to found upon the 'decree of the House of Lords, which has explicitly found that there 'was no forfeiture.' What says Mrs. Fullarton? She does not say now there was any forfeiture, but that if John acquired in 1742, and by subsequent enjoyment, a title against her, he also might or might not—she does not pronounce that he did or did not, but that he might or might not—acquire also a title against Sir Hew; but she says, without imputing forfeiture to anybody, I am ready to maintain that, under the charter 1742, I am entitled to the estate. I do not consider that as a contravention or a forfeiture; and therefore, putting forfeiture altogether out of the question, what I call upon you to argue with me is, What are the meaning and effect of the charter of 1742, taking the judgment of the House of Lords to be quite right, and which has determined nothing about the charter 1742, except that it is not a contravention—for *that* it has determined—and taking into consideration how far my claim is affected by the deed of 1780? Now, the deed of 1780 she did in her former summons state to be a contravention; she wanted to turn round in that action and say, that it is now my ground of title; to which Lord Thurlow says, I cannot allow you to say that; I am to decide according to the cause of action you have stated in your summons. I do not exclude your bringing a new summons; if you have erred, and fatally erred, so as never to be able to bring another action, those who have advised you are to blame; but we say, you have not sustained your case upon the grounds of conclusion you have prayed, and this course certainly cannot possibly in my judgment be admitted. Then Lord Glenlee goes on to say, 'For I 'cannot put another interpretation upon the judgment of the House of 'Lords, which reverses the interlocutors of the Court of Session, and 'finds that the matters in the appellant's summonses complained of are 'not sufficient to sustain the conclusions in these summonses, or any of 'the said conclusions, and therefore assoilzies the defenders.' Now, whether that is accurately pronounced in judgment or not, depends upon this: Your Lordships will look to see what are the matters complained of in the summons, and whether they are sufficient—not as grounds of complaint,—but are sufficient to sustain the conclusions in these summonses, or any of them, hoc intuitu, to the purpose of having a judgment establishing those conclusions. Then his Lordship says, 'The leading 'conclusion in that summons was, that the execution of the deed of 1740 'necessarily inferred a forfeiture, not only of the right of Sir Hew, but of 'his descendants.' The House was of opinion that it did not operate a forfeiture. I do not now enter into the question, whether that opinion was right or wrong; but if it was not a forfeiture, after the pronunciation of a judgment by this House that the deed of 1742 was not a forfeiture, how can you preclude anybody from claiming under the deed of 1742, who now says, You have told me this is not a forfeiture, and I now tell you that, if that is so, I claim under that deed; I have a title under it, and I must beg you—not to give me the benefit of that action and that sum-

mons, which contended that it was a forfeiture; but I beg you to give me now, under the new summons, what I before claimed under that former summons—to tell me whether I have not a title under this deed of 1742; and if so, grant me the benefit of it, unless you are of opinion that the deed of 1780 bars me. I have said before, that the deed of 1780 was treated as a contravention in the former summons. She could not be permitted in the former summons to say that the deed of 1742 was to be considered as a contravention of the deed 1688, and that the deed 1780 was a contravention of the deed of 1688; and then, under a summons stating these grounds of complaint, and praying those conclusions, that they might be all reduced as forfeitures, and as contraventions—she could not, I say, be permitted in that action to turn round and say, This is all very well—I beg now to say, the deed of 1742 is no contravention—I beg to have, under that summons, the benefit of the deed 1742. So far from this judgment being a judgment precluding a fair decision upon that, one reason why the House did dot come to a conclusion upon that was, that she might have a title under that deed which she had not alleged in that summons; and accordingly they do not go the length to say that the defenders are to be assoilzied from a summons stating other causes, or stating any other conclusions as the cause of that new summons. July 26. 1822.

This learned Judge then undoubtedly goes on to insist upon the circumstance of Sir Hew having forfeited for himself and his descendants, and then he takes notice certainly of the important point in this cause. He says, he decides that the nearest heirs of Joanna Hamilton are the persons who are to take, although Sir Hew Hamilton himself declined taking the estate. Then he says, as to the reduction of the deed of 1780, he need not say any thing about it; because, unless the pursuer is entitled to take the estate under the deed of 1742, she cannot set aside the other deed, which is entirely consistent with that charter, according to the interpretation put upon it. Then he proceeds to observe upon the act of 1621.

My Lord Bannatyne speaks of the res judicata in the way the learned Judges before him had done. Then he says, 'But when we come to the 'merits of the question, I agree with Lord Glenlee, that under the deed 'of 1742 this pursuer is not nearest heir, except on the supposition that 'Sir Hew and the heirs of his body were forfeited of their right under 'the entail by incurring an irritancy.' Now, my Lords, I beg leave very humbly again to observe upon this part, that the principle which is insisted upon in this action is, not that she has any title under forfeiture, but that previous to the year 1780, or previous to his death, John Hamilton had acquired under the deed of 1742 a title that could not be affected by the deed of 1780. By the effect of that deed of 1742, and by the effect of prescription in aid of that deed, there was a new title created by that deed of 1742, which barred Sir Hew, not on the ground of contravention or any act of forfeiture, but on the ground of a new title, and enjoyment under that new title, so as to give a right by the effect of that charter, and by the aid of prescription. My Lord Bannatyne ob-

July 26. 1822. serves, that this being so, and the House of Lords having declared there was no forfeiture, there was an end of all other questions; and he observes, 'That was a very singular proceeding, I think, because they reversed the 'judgment of this Court, and then they proceeded to give a judgment of 'their own. It was a proceeding extremely new; but, notwithstanding 'that, I am afraid we must give effect to it.'

My Lord Robertson states that he also concurs with Lord Glenlee on the point of res judicata, but states that they are not to lose sight of the judgment of the House of Lords; and then, after proceeding on the question of forfeiture as deeply affecting the present case, he gives an opinion, entitled certainly to very great respect, that the words 'heirs whatsoever' will entitle Sir Hew, and not this lady. Now, is it not remarkable that they are all giving construction to this deed with reference to the fact of a forfeiture on the part of Sir Hew, not determining at all that Sir Hew was to have any title under the deed of 1780, because they say that the deed 1742 is sufficient to entitle him?

My Lord Justice-Clerk, of whom I shall always speak with that great respect which I know personally to be due to him, seems to be of opinion that this judgment of the House of Lords that there was no forfeiture, had a considerable effect on the disposal of the present action, though he certainly does give an opinion that the words 'hæredibus quibuscunque' ought to be construed in the way that some of the other Judges had thought those words ought to be construed; and then he says, 'It is un-'necessary to consider the deed of 1780;'—and to be sure so it is, because if he was called to the succession by the deed of 1742, not on the ground of any forfeiture by Sir Hew or any of his descendants, or by John in that transaction of 1742, but on the ground that John had acquired a title under that charter, and under all the circumstances this charter had been taken,—he says, 'it is unnecessary to consider the 'effect of the deed of 1780,' (as it would be); 'for the deed of 1780, 'calling Hew nominatim, would not make him worse than he was, if en-'titled under the general expression of the deed of 1742.'

My Lords, I believe I may venture to say, that I have most carefully examined the summons I have now in my hand in the first action of Mrs. Fullarton, and the summons in the present action; and it appears to me at this day, that the case stands in a very different situation from that in which it stood in the year 1801. The question which is made by the present summons is upon the title made by the transactions in 1742, not considered as a forfeiture upon the authority of this House, nor to be considered as a forfeiture; but whether the deed of 1742, if rightly construed, gives her a right to the succession upon the death of John without heirs of his body, Robert being at that time gone out of the world without heirs of his body,—and whether the deed of 1780, if it was to be any bar to her title, ought to be removed out of the way, not upon the grounds of contravention, such as was stated in the summons on which the judgment of this House proceeded in 1801, but as a deed not to be tolerated, regard being had to the title to be made by her under the deed of 1742.

Now, my Lords, in a case of this great value, and of this great importance, (for I understand it to be of great value and of great importance,) I should be extremely sorry to have the presumption to say, that I very confidently think that that instrument of 1742 has been construed, not according to its true legal effect and meaning; but I have no difficulty in saying, that if I were bound, under the sanction under which I act as a Judge, to give my opinion at this moment, and without further information, whether Mrs. Fullarton was not the person called under that deed of 1742, next to John, provided Robert was out of the way, and the heirs of his body out of the way, I should say, that I did think she was the person intended to be next called. I am to look here to what was intended to be done. If the law must give effect to the intention, that is another matter. Take into consideration all the acts of John:—he is served heir,—and he is served heir in a service that takes notice that he is the second son, and yet heir, 'et sic' heir. The word 'heir,' therefore, with respect to him, is a word that could not be used with propriety, unless it had a special sense. How could he be stated in those pleadings to be heir, if the elder brother, or descendants from him, were alive, and noticed to be alive, unless the word heir has a flexible sense? He is stated not only to be the heir, but he is stated to be the second son in that instrument, and so (et sic) heir. July 26. 1822.

Your Lordships will recollect that this deed of 1742 was a deed which proceeded on a desire expressed by Sir Hew himself. I will not say that it would therefore bind the descendants of Sir Hew from quarrelling with the deeds and instruments, or any thing else that they have a right, according to the law of Scotland, to reduce, as to which no steps whatever have been taken; but, if your Lordships recollect, the very instrument of repudiation states that he is to be at liberty to take the property again upon the decease of John and of Robert—of both—without issue. Now I desire to know who would have taken under that deed of 1742, if John had died in the year 1742, Robert then still living. Could Sir Hew have said then, upon the ground of actual intention, 'I intend, by suffering my brother to be served heir, and under the charter, to make use of 'the procuratory of resignation, but to come in nevertheless against my 'brother, and the heirs of his body?'—Surely that would not have carried into effect his own purposes, seeing that he was not to take next to John, and the heirs of his body, if Robert and the heirs of his body were to take next; and he must have again repudiated for himself, not only the entail of 1688, but the charter of 1742.

If John had died in 1743 without issue living, would not Robert, at least according to intention, have been the person to take under the 'aliis 'hæredibus quibuscumque,' as John was the second son, et sic (and so) heir, would not Robert, in such circumstances, according to intention at least, have been the third son, and so heir?

My Lords, if your Lordships look at the whole of these proceedings,—the decreet, the service, and the charter of resignation, the whole tenor and series of those acts, and all the other acts,—I think you will put a

July 26. 1822. sense, when arguing upon intention, upon the words aliis hæredibus quibuscunque, that will include Mrs. Fullarton to take next after the decease of John and his issue, Robert having predeceased John without issue. If you look at the whole of these matters, I believe you will find it extremely difficult to say that those words were intended to describe Sir Hew or his issue. If the words are flexible, it appears to me as difficult a proposition as I ever had to grapple with, to say that they meant Hew, considering what was the purpose that Hew was about to accomplish in permitting John to take, to act, and to be served in the manner he took, acted, and was served. I am not entering into the question, whether he or his descendants could have reduced all this; but there is nothing reduced, and it appears to me most obvious that the words aliis hæredibus quibuscunque were intended to denote such alii hæredes as John was, and his sons were. That may not be according to the strict sense of the words, but that the intention was, that the hæredes to take were the hæredes in the order of succession under the deed 1688, always recollecting that these instruments (I believe every one do expressly refer to that entail of 1688, and do expressly, in referring to that entail of 1688, alter, or upon the face of them at least appear to be intended to alter, the succession that that deed of 1688 was meant to establish.

Then we are told there is the proviso which has been referred to. There is reference in all the transactions to the deed of repudiation; but, even in John's deeds, none of the public acts in which he was engaged takes any notice of that proviso. No record takes notice of that proviso—none;—and that being so, it seems to me there is a very considerable question, whether that proviso ought to have any weight—and I incline to think it ought to have no weight—in the decision of this question.

My Lords, it may be owing to my ignorance of the law of Scotland, (which no man can be more sensible of than I have been very long, and I am afraid I shall have reason to be till the last moment I attend to any business of this sort,) that I should have liked to have seen it stated in what way Hew was to make out his title under the deed of 1688. To whom was he to serve heir? Was he to serve heir to John and his issue, or Robert and his issue, if he had any? If he was to serve heir under the deed of 1742, and to make out that he was the person meant by the aliis hæredibus quibuscunque in the deed of 1742, then I can understand how he was to make himself out heir to John; but how is he to make himself out heir to John under the limitations of the deed 1688? I do not find that question touched.

My Lords, when this decision was made in the year 1801, it was a decision which your Lordships made upon the judgment given by the whole Court of Session; for the Court was not at that period in two Divisions. It is naturally enough to be expected, that between the year 1801 and the year 1821, there may have been such a change in the persons sitting on the Bench, that, without any blame anywhere, the effect of a judgment in this House may, under these circumstances, be misunderstood; and I state that with all humility, but at the same time with a good deal of

confidence, because I am quite sure that, in the discussion of this very business, my noble and learned friend, who was not here at that period, has had more difficulty in understanding the proceeding than I had, who was then present, and had continued to exist from 1801 to 1821. I know that your Lordships are not to take from me, but from the record, what was the nature of that former action, and what was the intention in giving that judgment. I could state my full conviction that the judgment never was meant to prejudice the question brought forward in the present action; but the dictate of my memory must go for nothing. You must find in the summons, and in the conclusions of the summons, that which I state, and not take it upon any assertion of mine that I believe it to be so. My noble and learned friend has had the opportunity of looking into those summonses and this judgment, and he is perhaps better qualified, from the research he has made, and from having more time, and especially in as much as he was not here in the year 1801, to judge of their effect. Upon the great question in the present action, namely the effect of the limitation aliis hæredibus quibuscunque, and the effect of the deed of 1780, it is impossible for me to say, upon any thing I have seen, that the strong impression which my mind had received, that that construction of the hæredibus quibuscunque, which is against Mrs. Fullarton, is not a right construction according to intention, has been removed; and in the notes there is not discussion enough to destroy my impression as to the intention, or to enable me to determine that what I believe to be the intention cannot be legally effectuated. At the same time I know, that without our most thoroughly understanding the effect of Scotch law, and the effect of Scotch instruments, we may be running great risk indeed of endangering property very considerably, if we do not seek for the best information we can get, before we finally conclude upon the effect of the deed of 1742. As it is reasoned upon in the papers before the House, I see what are the objections which are made to it. I cannot say that these objections affect my mind, but I have not the benefit of the reasons of the learned Judges upon all points. I agree that if the deed of 1742 means Sir Hew, it does not signify what is the meaning of the deed of 1780. The consequence of all is, that unless your Lordships should appear to be of a different opinion, it would be right again to remit this cause to the Court of Session, calling upon the Division of the Court of Session to submit also the whole to the opinion of the other Division of the Court of Session, that we may know what the opinion of the whole of the Judges is upon the deed of 1780; and to remit it with a declaration, that this House has pronounced no judgment heretofore to affect the decision of the Court, and that it is wished the Judges should particularly apply themselves to the determination of the points, what is the legal meaning of the words in the deed of 1742, and what would be the effect of the deed of 1780, if the legal interpretation of the deed of 1742 were favourable to Mrs. Fullarton. I have only to say again, (which is perhaps going further than I ought to do,) that under the highest sanction under which I can give my present opinion, I should say, that, looking at intention, those

July 26. 1822.

July 26. 1822. words ought not to be construed as the Judges have construed them; but I state that with the reserve with which a Judge ought to state his opinion, who wishes that other Judges should further consider the intention and legal effect of those instruments. If my noble and learned friend concurs with me, it appears to me that the proper way will be, to remit the cause to the Court of Session, with some such declaration as this.

Lord Redesdale.—My Lords, after attending, with all the diligence I have been able, to what has passed upon this occasion, it does appear to me that the judgment in 1801 does not in any degree affect the question now before your Lordships—that that proceeded upon the form of the summons in the action then under the consideration of the House, and that it was upon that ground only the House disposed of that appeal. The question now before your Lordships appears to me to be a different question, namely, Whether, under the charter of 1742, Mrs. Fullarton is now entitled to receive this property, claiming, under the words of that charter, the property on failure of certain other heirs of Joanna Hamilton? In looking to that question, it seems to me important to consider, in order to give construction to that charter, under what authority it proceeded. It proceeded first of all upon the decreet of 1741, in which the judgment of the Court was pronounced against Sir Hew Dalrymple, that John Hamilton was the heir of entail then entitled to succeed by virtue of the settlement of 1688; and that the whole title of John Hamilton was further founded upon his being the true heir of entail entitled to enjoy the property under the settlement of 1688. This decreet, therefore, concludes the title (so far as it is in its nature conclusive) of John Hamilton. It finds him to be the person entitled, in the order of succession created by the settlement of 1688, immediately to take the estate. According to that decreet the retour proceeded, and that retour found him the heir also, under the entail of 1688, entitled to succeed to this property, to the exclusion of Sir Hew. Upon that, he became entitled to use the procuratory of resignation contained in the original settlement of 1688. He had no right to use that procuratory of resignation in the manner in which he did use it; the superior had no right to grant him the title which the superior did grant him, except under the authority of that instrument of 1688, and upon the ground that he was the person then called to the succession by the force of that instrument of 1688; and it appears to me, that the whole construction of all the proceedings of the decreet, of the retour, and of the charter,—the construction of all these instruments is to be taken to be, that, in conformity to the succession created by the instrument of 1688, John Hamilton was the person entitled to enjoy the estate to him and the heirs of his body—that he was so entitled, as the heir of Joanna Hamilton, according to the entail of 1688, not as being the heir of her body procreate by Robert Dalrymple, but that he was that qualified heir of the body which the entail of 1688 meant should enjoy the property in the order of succession created by that deed. It seems to me, therefore, that the settlement of 1688, as interpreted by the decreet

of 1741, by the retour, and by the charter of 1742, giving the estate to John Hamilton, must govern the construction of the words contained in that charter, because the charter professes to be in obedience to the decreet, and in pursuance of the retour. The decreet and the retour constituted John Hamilton the person in the order of succession under the deed of 1688, the person entitled to that property. July 26. 1822.

Then, my Lords, under the deed of 1688, who were the heirs to succeed to John Hamilton according to the course of succession regulated by that deed? The next person was Robert, and the heirs of his body. The next person was the present appellant, and the heirs of her body. To admit Sir Hew Dalrymple and the heirs of his body into the succession was to violate the order of succession created by the settlement of 1688, if that course of succession had not been violated by the introduction of John Hamilton. Therefore, to give consistency to the title under the decreet and service,—to give consistency to the title under the retour,—and to give consistency to the title under the charter of 1742, the construction of that charter must be, according to the view I entertain, (subject to any construction which that might have by a further argument upon it, and by a more intimate knowledge of the Scotch law than I can pretend to have;) but, according to the view I have at present upon that subject, it is impossible to say that the just construction of the charter of 1742 can substitute, after John Hamilton and the heirs of his body, any other persons than those who were entitled to succeed to John Hamilton and the heirs of his body by the settlement of 1688. The charter professes to be according to that settlement; it professes to act under the authority of that settlement, and therefore, I should think, cannot be construed to be intended to violate the order of succession intended to be established by that settlement. Under this impression, therefore, I can give, as at present advised, no other construction to the words 'aliis 'hæredibus quibuscunque,' than those heirs who were of the same nature and description as John Hamilton himself—that is, the persons called to succeed, to the exclusion of Sir Hew Dalrymple and the heirs of his body.

My Lords, when I come to consider the manner in which I apprehend the title is to be made up on the death of John Dalrymple, who was undoubtedly seised to him, and the heirs of his body under that charter, and was therefore the last person who had the actual sasine of the estate, according to the settlement of 1688, I apprehend that, according to the law of Scotland, the person to be retoured heir under the settlement of 1688 must be the person who, according to the terms of that settlement in the order of succession created by it, could be served as heir of John Hamilton. That, I apprehend, can only be the present appellant. Sir Hew Dalrymple cannot serve himself heir of provision to John Hamilton under the settlement of 1688. If he is to come in in any manner as heir of John Hamilton, it must not be under the settlement of 1688, but under a different title. I do not enter into the discussion now, whether, under the instrument of 1780, he could or could not claim according to the

July 26. 1822. terms of that instrument, that deed having been executed by John Hamilton, and its validity depending upon the power John Hamilton had to execute that deed. I therefore perfectly agree with the noble Lord who has already addressed your Lordships, that the species of qualified finding he has proposed is that which ought to be framed by your Lordships, that your Lordships may not preclude the discussion of any question which ought to be discussed, and which it appears has not been fully discussed in the Court below; that it is necessary, in the first place, to find (which appears to me perfectly clear) that what passed in 1801 has not precluded any of the questions raised in the present appeal. If I were to give it any construction, it would be of this description,—that the House were then of opinion that the charter of 1742, and the limitations contained in that charter, were limitations according to the settlement of 1688, and therefore according to the claim now made by Mrs. Fullarton; but I apprehend the House did not mean to make any decision upon that subject, but to leave the question wholly open, and to proceed entirely upon the insufficiency of the summons, which they had then to consider as the foundation of their decision, to warrant any decision of that kind in favour of Mrs. Fullarton.

My Lords, this being the state of the case, the action which is now pending, and which has come by appeal before your Lordships, appears to me to be of a totally different description, founded on a different ground, and a ground even contradictory to the ground on which the original proceeding was framed; for now it is to the advantage of Mrs. Fullarton to claim under the charter of 1742, and to insist that she, according to the true construction of that charter, is the person entitled to succeed to John Hamilton in this property. John Hamilton remained in possession of the property under the charter until the time of his death. No actual sasine of the property was in any other person but John Hamilton, under the charter of 1742, at the time of his death; and the question then is, What was the title which, on the death of John Hamilton, accrued either to Mrs. Fullarton or to Sir Hew Dalrymple? Mrs. Fullarton claims upon the construction of the charter of 1742; that, I must confess, does appear to me to be the true construction of that charter. Sir Hew Dalrymple insists upon the title under the deed of 1789; that title does not appear to me to have been investigated in the Court below, because they proceeded upon a ground which did not make it necessary for them to investigate that title at all. The repudiation by Sir Hew Dalrymple undoubtedly was qualified by the terms of it; but that qualification, I apprehend, as far as I am informed upon the subject, can have no effect whatsoever, because it does not in any manner appear upon the subsequent proceeding—it forms no part of the title appearing upon the record—it is not expressed either in the retour of service, or in the charter of 1742;—they have both proceeded upon a simple repudiation unqualified.

My Lords, if the question were put to me, informed as I now am, whether Sir Hew Dalrymple could qualify his repudiation, I should

say, that I apprehend he could not; and that any qualification of that repudiation, contained in the instrument of repudiation, would, according to the law of Scotland, as far as I am informed of it, (but I certainly must speak ignorantly upon the subject,) be void and of no effect; and I am strongly impressed with the idea, that that is the law of Scotland, because the retour of service, and the charter in 1742, take no notice whatsoever of that qualification. My Lords, Sir Hew Dalrymple repudiated the succession. I apprehend that he could only affect his own rights, unless his doing so amounted to an irritancy, which might have been taken advantage of for the purpose of avoiding the title of the heirs of his body. No such proceeding has been had; and therefore, whether or not the present Sir Hew Dalrymple, claiming as heir of his body, can affect the proceedings on the decreet of service, the retour founded upon it, or the charter 1742, in that distinct character, is a question upon which I can venture to say nothing at all; and I conceive that that ought to be left perfectly open by your Lordships, unless your Lordships were much better informed upon that subject than I can pretend to be. I therefore think that your Lordships, leaving open the question, what may be the true construction of the charter 1742—what may be the rights of Sir Hew Dalrymple under the deed of 1780—what may be his rights to reduce either the service, the retour founded upon it or the charter of 1742, if he can have any such rights—leaving out all these questions, that your Lordships will most properly refer this cause back again to the Court of Session, for them to review and consider the whole subject, without any effect upon their minds of the preceding judgment of this House in 1801, which seems to me to have operated upon them in a manner in which, according to my view of it, it ought not to have done. I wish the case, therefore, to go back again wholly unprejudiced by any thing which may be pronounced by your Lordships in judgment, whatever opinion I may individually have formed upon the true construction of the charter of 1742, that being the opinion of an individual, and in no manner acted upon by the House. My Lords, I therefore concur in thinking, that what has been proposed by the noble Lord on the Woolsack is the proper manner in which your Lordships should dispose of this question, which is not only a question of great importance in point of value, but, it appears to me, is a question of great importance in respect of the law of Scotland. It is very evident that the law of Scotland, so far as concerns entails, is a law which does tend to create a variety of very important and extremely difficult questions; and with the partiality which an Englishman naturally feels for the law of his country, I confess to your Lordships I do extremely congratulate myself that the titles of estates in this country do not depend upon the law of tailzie which prevails in Scotland.

July 26. 1822.

Appellant's Authorities.—(1.)—Kames's Elucid. art. 28; Kinlochs, Dec. 27. 1792, (12233); 4. Stair, 20. 12; 4. Stair, 40. 16; Ibid. 3. 3; Graham, May 20. 1814; Dow's Reports, p. 314.—(2.)—3. Ersk. 8. 47; Earl of Dalhousie, Jan. 13. 1712, (14014); M'Lauchlan, Jan. 12. 1757, (2312); 2. Stair, 5. 25; 2. Stair, 3. 51;

July 26. 1822. Creditors of Broughton, June 20. 1739, (10247); Munro, May 19. 1812, (Mor. Supp. Vol. I. No. 10. *voce* Prescrip.)

Respondents' Authority.—Grieve, Dec. 7. 1760, (3022.)

SPOTTISWOODE and ROBERTSON,—J. CHALMER,—Solicitors.

(*Ap. Ca. No.* 40.)

No. 50. WILLIAM MILLER, Esq. and Others, Appellants.—*Warren—Jeffrey—Skene.*

PATRICK MILLER, Esq. Respondent.—*Greenshields—Thomson.*

Clause—Provisions to Children.—A father having made certain mortis causâ provisions in favour of his younger children, and disponed, mortis causâ, his whole estates, real and moveable, to his eldest son, subject to these burdens; and having thereafter bound himself in his eldest son's contract of marriage to leave his whole estates to him, under burden of the provisions 'made by him for his 'younger children;' and having thereafter advanced to them large sums during his life, and granted to them additional provisions, partly of a permanent nature, and partly payable at his death; and the Court of Session having held, that as the provisions made prior to the contract of marriage were fit and proper, it was not competent for the father thereafter to increase them, and that sums paid to the children during his life, must be imputed in extinction of the original provisions;—the House of Lords found, That the question was to be decided by the sound construction of the above clause; and that as the exception in the contract of marriage referred to provisions payable mortis causâ, he was not barred from advancing sums to the younger children during his life; but that all provisions of a permanent nature, or payable after his death, were in fraudem of the contract, and were to be imputed in extinction of the original provisions, and, quoad ultra, ineffectual.

July 30. 1822. 1ST DIVISION. Lord Alloway.

THE late Patrick Miller, Esq. of Dalswinton, had three sons, Patrick, William, and Thomas-Hamilton,—and two daughters, Janet, afterwards Mrs. Erskine, and Jean, afterwards Mrs. Jones. In the month of May 1790 he executed a trust-deed of settlement, by which he conveyed his estate and whole effects to his eldest son Patrick and the heirs of his body, but subject to the burden of the following provisions:—'To William Miller, my second son, 'and his foresaids, of the sum of £7000 sterling, and that over 'and above the sum of £1920 already paid by me for his com-'mission—to Thomas-Hamilton Miller, my third son, and his 'foresaids, of the sum of £7000 sterling—to Janet Miller, now 'Mrs. Erskine, my eldest daughter, and her foresaids, of the 'sum of £7000 sterling—and to Jean Miller, now Mrs. Jones, 'my youngest daughter, and her foresaids, of the sum of £7000 'sterling.' On the 6th of January 1803 he executed a deed of alteration, by which he declared, 'The said provision of £7000 'sterling to the said William Miller, my second son, is hereby

'diminished and restricted to £4000, which, with the sum paid 'for commissions, and £1000 borrowed for him, and two legacies 'of £1000 each hereafter bequeathed to his two children, make '£10,000 sterling.' At the same time he gave the following additional provisions:—'To the said Thomas-Hamilton Miller, my 'third son, and his heirs and assignees, the sum of £1500 ster-'ling, which, with the said provision of £7000 sterling, and 'money advanced to and borrowed for him, and obligations which 'I am about to come under on his account, make £10,000 ster-'ling,—to Jean Miller, my youngest daughter, £3000 sterling, 'which, with the sum already provided to her, also makes £10,000 'sterling.' He at the same time restricted the provision of Mrs. Erskine to £5000, having provided to her other £5000 in her contract of marriage; and declared that these provisions, with the legacies to William's family, were 'all to form real burdens on and 'affecting the whole lands and estates conveyed to the said Patrick 'Miller, my eldest son, and the other heirs therein mentioned by 'the foresaid disposition and settlement, as effectually as if they 'had been inserted in the said disposition and settlement.' Having afterwards purchased a majority in the army for William at £1100, he restricted his provision to £2900. All of these provisions were to be payable after his death. July 30. 1822.

In the following year, Patrick paid his addresses to Miss Cumming, and a great deal of correspondence took place between him, his agent, and his father, relative to the settlements which were to be made upon him and his family. His father having agreed to convey to him, on his own death, the estate of Dalswinton, and his whole moveable estate, proposed that a clause should be introduced into the contract of marriage in these terms:—'Declaring always, as it is expressly provided and de-'clared, that the said Patrick Miller senior shall have the free 'use and disposal of his whole property, both heritable and 'moveable, during all the days of his life, and may borrow money 'on heritable security, and otherwise burden the same as he may 'think proper, which shall be considered preferable to any se-'curity granted by this deed, and also the burden of such provi-'sions as he has already made *or may make* in favour of his 'younger children or grandchildren, and also the burden of his 'debts, under which declarations and burdens these presents are 'expressly granted, and no otherwise; it being always under-'stood, that the said Patrick Miller senior shall not alter the 'succession to his estate above mentioned, to the prejudice of the 'said Patrick Miller junior.' In the contract of marriage, as finally arranged, and to which Mr. Miller was a party, he and

July 30. 1822. his son bound themselves to provide a jointure of £800 to Miss Cumming, in security of which Patrick was to infeft her in the estate of Dalswinton, in the event of his surviving his father, and so succeeding to the estate. Mr. Miller also bound himself to pay to his son an annuity of £500, and then there was this clause: 'As also, the said Patrick Miller senior of Dalswinton binds 'and obliges himself, his heirs and successors, to provide and se- 'cure, and dispone and make over, heritably and irredeemably, 'all and whole the lands and barony of Dalswinton, comprehend- 'ing, &c. from and after his decease; as also all other lands and 'heritages, as well as all debts and sums of money, and estate, 'real and personal, that may belong to him at his death, to and 'in favour of the said Patrick Miller junior, and the heirs-male 'of his body of this present marriage; whom failing, &c.; with 'and under the burden always, however, of the debts of the said 'Patrick Miller senior, and provisions *made by him* for his younger 'children and grandchildren.' This deed was executed on the 5th of October 1804, and the marriage thereupon took place.

In the months of April and July 1811, Mr. Miller executed a deed proceeding on the narrative, that, by the advances which he had made to William, the provision of £2900 had 'been fully 'satisfied and paid; and it being my wish and intention, although 'the said advances made, and engagements come under by me to 'and on account of the said William Miller, should exceed the 'foresaid provisions, that, notwithstanding thereof, such excess 'should not form any claim against him or his heirs at the in- 'stance of my heirs and successors; and being also desirous, in 'his particular circumstances, to provide him in the annuity after 'mentioned;' therefore he granted a bond of annuity to him and his wife for their lives, and discharged him of all claim for repayment of the advances, or relief from the engagements. At the same time he executed an irrevocable bond of £5000 in favour of William's children, and another bond in favour of William himself for £8000, —the object of the last bond being to relieve him of certain embarrassments, and which was afterwards assigned by William to Mr. Marshall for behoof of his creditors. In addition to these sums, Mr. Miller, in 1815, executed another bond in favour of William, proceeding on a narrative of his embarrassments; and 'therefore, 'and for the love and favour I have and bear to my second son, 'William Miller, wit ye me, in the first place, to be bound and 'obliged, as I hereby bind and oblige myself, my heirs, execu- 'tors, and successors whatsoever, to make payment to the said 'William Miller, his heirs, executors, or assignees, of the sum of '£10,000 sterling, over and above all other advances and provi-

'sions hitherto granted by me to him, and that at the first term 'of Whitsunday or Martinmas after my death, &c.; and, in the 'second place, I hereby declare that no acknowledgments, dis- 'charges, or other documents granted by the said William 'Miller to me, shall bind him to the effect of depriving him of 'the benefit of the provisions, in addition to the former advances 'and provisions made by me to him.' July 30. 1822.

In like manner Mr. Miller, subsequent to the date of the contract of marriage, made additional provisions to his second son, Mr. Thomas-Hamilton Miller. In particular, on the marriage of that gentleman in 1809, his father granted to him and his family a bond of provision for £5000, and in 1811 bestowed upon him and his wife an annuity of £150. He also, in 1813, granted a bond of £7000 to Claud Russell, Esq. trustee for the creditors of Mr. Thomas-Hamilton Miller; and in 1815 he bound himself to pay to the latter £5000, over and above all other provisions and advances which he had made for him, and discharged them accordingly. In 1811 he executed bonds of provision in favour of each of his daughters for £7000, in addition to the sums already provided to them.

From an early period Mr. Miller had kept a regular account of every sum which he had advanced to his children, who were accordingly entered as debtors for the amount in his books. From these it appeared that there was a balance against each of his two sons, William and Thomas, of upwards of £10,000, and against his daughters of about £1000 each.

With a view to carrying the above provisions into effect, and discharging these book-debts, and for other purposes, Mr. Miller, in 1815, executed a trust-deed of settlement, in which, after narrating those which he had formerly made, he stated, that 'I have, 'both prior and subsequent to my said deed of settlement, 6th 'January 1803, made sundry payments or advances on account 'of William Miller and Thomas-Hamilton Miller, my sons, and 'Mrs. Janet Miller alias Erskine, and Mrs. Jean Miller alias 'Jones, my daughters, which payments were entered in my books 'to their respective debits: I hereby declare, that prior to the 'date hereof, I have discharged the whole of said payments 'or advances by entering the same to profit and loss in my 'said books, and docqueting the same with a declaration to that 'effect; and therefore the whole vouchers of said payments and 'advances are also hereby declared to be cancelled or delivered 'up, and to be no longer of any force or effect, and shall not be 'held as any deductions from the provisions in favour of my said 'children, by my deed of settlement last mentioned.'

July 30. 1822. Towards the end of the same year Mr. Miller died, and his eldest son thereupon succeeded to the estate; and having unsuccessfully exposed the estate to sale at £140,000, and finding, as he alleged, that the succession was more than exhausted by his father's debts, and the provisions in favour of his brothers and sisters and their children, and conceiving that those granted subsequent to the date of his contract of marriage in 1804 were not effectual, he brought an action of declarator and reduction to have this ascertained. He there concluded 'to have it found and declared, 'that the provisions and sums of money settled and provided by 'the said Patrick Miller by his deed of settlement, 5th May '1790, and deed of alteration thereof, the 6th day of January '1803, under the deductions therein and after specified, form the 'only good and available settlements in favour of his said children 'and grandchildren, and that any sum or sums of money ad-'vanced and paid by the said Patrick Miller to any of his said 'children or grandchildren, or sums paid or debts contracted to 'others for their behoof, form an article of charge against the 'said child or children respectively, and fall to be imputed pro 'tanto to the amount of the provisions ultimately to be found 'due to them.' He also concluded, that the sums entered to the debit of his brothers and sisters in his father's books, 'and such 'other and further sums as shall appear from the said books, to 'be otherwise condescended upon, to have been paid and ad-'vanced to, for, and on account of the said children or grand-'children, ought to form an article of charge against them; and 'the foresaid discharge in the said trust-deed, whereby it is de-'clared that none of these articles should form an article of charge 'against them, should be held pro non scripto, and declared to 'have no force or effect;' and on these principles he concluded for a count and reckoning.

Against this action the younger children stated in defence,—

1. That the late Mr. Miller having been left only a patrimony of £700, while his elder brother was greatly enriched, had received a deep impression against the unequal distribution of property occasioned by the law of primogeniture:—that he had openly avowed on all occasions that he was resolved that no such distinction should be made in the distribution of his effects, and that his younger children should be equally as well provided for as the eldest son:—that, prior to the contract of marriage in 1804, a great deal of correspondence had taken place with his eldest son, from which it was established that Mr. Miller was resolved that he should not be fettered in any way, either as to contracting debts, or making additional provisions in favour of his younger

children; and therefore that the words of the clause ought to be interpreted and explained by that correspondence, from which it appeared that it was the intention of Mr. Miller to reserve a right to make additional provisions. July 30. 1822.

2. That as a spes successionis only was conferred by the contract of marriage in favour of the eldest son, and as Mr. Miller remained vested in the absolute right of the estate, he was entitled to make what advances he chose from the bulk of his fortune, either in the shape of annual allowances to the younger members of his family, or of payments bonâ fide to their creditors, and that his promise to convey the estate to his elder son had only reference to the amount or value of it as at the period of his death; and,—

3. That, on a correct estimate of its value, it would be found that the succession was extremely lucrative, and much beyond that which Mr. Miller had all along contemplated should belong to his eldest son.

The Lord Ordinary found, 'First, That in the contract of 'marriage betwixt the pursuer and Miss Martha Cumming, 'and to which the late Patrick Miller, Esq. of Dalswinton, 'the pursuer's father, was a party, his father came under se-'veral most onerous obligations; viz. 1. To pay £800 of 'jointure to Miss Cumming, if she should survive the pursuer, 'to be restricted in the event therein mentioned. 2. To pay an 'annuity of £500 to the pursuer all the days of his life. 3. To 'make over and dispone not only all and whole his lands of Dal-'swinton, but also all other lands and heritages, as well as debts 'and sums of money and estate, real and personal, that might 'belong to him at the time of his death, to and in favour of Pa-'trick Miller the pursuer, and the heirs-male of the body of the 'present marriage, &c.; with and under the burden always of 'the debts of the said Patrick Miller senior, and provisions made 'by him for his younger children and grandchildren; and, 4. The 'said Patrick Miller senior binds and obliges him and his fore-'saids to execute all writs and deeds requisite for carrying the 'said obligation upon him into execution: And the deed also 'contains obligations upon the pursuer, in the event of his father's 'death, to infeft and seise his wife in the foresaid annuity in the 'lands of Dalswinton and others, and to make payment of certain 'provisions to younger children, other than the heir of the mar-'riage succeeding to the lands of Dalswinton. Second, That, in 'terms of this obligation granted nominatim to his eldest son, the 'late Mr. Miller was bound to leave the estate of Dalswinton and 'his other property to him and the heirs of that marriage, and 'that this obligation could not be defeated by any gratuitous deed

July 30, 1822. 'whatever. Third, That as these estates were conveyed under 'the clause before recited, burdening them with the debts of Mr. 'Miller, and with provisions made by him for his younger children and grandchildren, he might, in virtue of that reservation, 'have granted reasonable provisions to his younger children and 'grandchildren, if fair and reasonable provisions had not previously been made; but that this reservation could not entitle 'Mr. Miller to defeat and render altogether useless the previous 'obligation he had come under, by gratuitous and exorbitant provisions in favour of his younger children and grandchildren. 'Fourth, That it is expressly alleged by the pursuer, that even 'supposing the estate of Dalswinton had been sold at the upset 'price at which it was lately exposed, being £140,000, and according to the valuation put upon the other funds, instead of 'any part of the estate remaining to the eldest son, there was a 'deficiency of no less than £19,000 for the payment of his debts 'and provisions to his younger children,—the amount of his debts 'being £90,501 : 12 : 2, and the provisions to his younger children and grandchildren £86,500. Fifth, That the amount of 'these provisions, in so far as they exceed reasonable and fair 'provisions granted posterior to the contract of marriage, must 'be reduced as gratuitous and exorbitant, and granted contra 'fidem tabularum nuptialium. Sixthly, That although, in the 'circumstances of the case, there seems to be clearly an excess in 'the provisions to the younger children, yet it seems difficult to 'ascertain the amount of that excess until the value of the estates 'and other property left by the late Mr. Miller can be ascertained, 'especially as the parties differ so materially with regard to the 'value of that property. Seventh, That any debts which the 'late Mr. Miller came under an obligation to pay for his sons to 'third parties, although effectual as debts against the father, must 'still be held as provisions paid on account of his sons, and accordingly must be taken in computo of the sums claimed by 'them; and, Eighth, That the bond granted by Mr. Miller to 'Claud Russell, as trustee for the creditors of Mr. Thomas-Hamilton Miller, must be held as in extinction pro tanto of his provisions, exclusive of those settled upon his wife and children by 'the contract of marriage, to which his father was a party; and 'therefore appointed each party to give in a condescendence, 'stating, in the first place, the whole sums drawn by the different younger children and grandchildren from their father's 'funds; second, the sums provided to them by the different 'deeds; and, third, the value of the whole of Mr. Miller's estates, 'real and personal, and the grounds upon which the calculation 'of that value proceeds.'

Both parties having reclaimed, the Court remitted to an accountant 'to prepare a statement of the estate and funds of the 'late Mr. Patrick Miller, and with the burdens thereon, debts 'due by him, and provisions made by him for his several children.' From his report it appeared, that, taking the estate at the above upset price, the total funds left by Mr. Miller amounted to £148,500; that his debts extended to £90,999. 6s., leaving a free residue of £57,500. 14s.; but the provisions and advances for the younger children and their families amounted to £84,000, so that there was a deficiency of nearly £27,000. On advising that report, the Court found, 'That the several provisions made 'by the late Patrick Miller for his several younger children, be-'fore the date of the pursuer's contract of marriage of 5th Octo-'ber 1804, were suitable and adequate; and that, in the whole 'circumstances of the state of the said Patrick Miller's affairs and 'fortune, after the date of the said contract, and down to the 'time of his death, it was not competent for him to make any ad-'dition to the said provisions; and remitted to the Lord Ordinary 'to inquire how far payments made by the said Patrick Miller to 'the several defenders, or advances made by him to them, or on 'their account, before the date of the said contract of marriage, 'and more especially how far such advances or payments made 'to them, or on their account, before their forisfamiliation re-'spectively, are or are not to be imputed in extinction of their 'said provisions; and, with these additions and variations, ad-'hered to the Lord Ordinary's interlocutor.' Against this judgment William Miller and the other younger children presented a petition; but the Court, on the 6th of March 1818, refused it.* July 30. 1822.

Having afterwards obtained leave from the Court, they entered an appeal; and the House of Lords found, 'That by the 'provisions contained in the contract of 5th October 1804, en-'tered into by the late Patrick Miller deceased, on the marriage 'of his eldest son, the respondent, Patrick Miller, he bound 'and obliged himself, his heirs and successors, to provide, se-'cure, and dispone, and make over, heritably and irredeemably, 'the estate of Dalswinton, and his whole other estate, real and 'personal, that might belong to him at the time of his death, 'under burden always of the debts of the said Patrick Miller, 'the father, and provisions made by him for his younger children 'and grandchildren:—that the exception contained in the said 'marriage-contract of provisions made by him for his younger 'children and grandchildren ought not to be construed to extend 'to enable him, by gratuitous provisions in favour of his younger

* Not reported.

July 30. 1822.

'children and grandchildren, to defeat the interest of the said 'marriage-contract with respect to the provisions thereby intended 'to be made in favour of the respondent Patrick Miller and his 'wife and children; but that in as much as the provisions made 'by the said Patrick Miller for his younger children and grand-'children, by deeds executed previous to the said marriage-con-'tract of 5th October 1804, were made to take effect only on his 'death, the same were not in their nature provisions for his said 'children and grandchildren during his life, and that therefore 'any gifts or payments of money given or made by him to or for 'such younger children or grandchildren in his lifetime, which 'were not in the nature of permanent provisions for them, ought 'not to be considered as in extinction or satisfaction of the pro-'visions so made for them previous to the said marriage-contract, 'and intended to take effect on his death; but that the several 'provisions made by the said Patrick Miller, deceased, for his 'children and grandchildren, by deeds executed after the said 'marriage-contract, ought to be considered as in fraud of the said 'marriage-contract, so far as they exceed the provisions made for 'such younger children and grandchildren respectively, by deeds 'executed before the date of the said marriage-contract, and so 'far as such children or grandchildren are respectively interested 'therein, and except so far as any provisions so made for such 'grandchildren may be deemed to have been substituted in lieu 'of provisions made for their respective parents before the date 'of the said marriage-contract; but that the same, so far as the 'same ought not to be considered as in fraud of the said marriage-'contract, ought to be considered as in satisfaction, or in part 'satisfaction, of the provisions made for such younger children 'and grandchildren, by deeds executed before the date of the 'said marriage-contract: And further, that the obligations which 'the said Patrick Miller, deceased, entered into after the date of 'the said marriage-contract, for the benefit of any of his children 'for valuable considerations, although effectual as debts against 'the estate of the said Patrick Miller, deceased, ought to be con-'sidered as provisions for such children, and taken in computo of 'the sums claimed by them respectively under the provisions 'made for them respectively by deeds executed by the said Pa-'trick Miller, deceased, before or after the date of the said mar-'riage-contract: And it is ordered, that, subject to these find-'ings, the cause be remitted back to the Court of Session to re-'view the several interlocutors complained of, and to do there-'in as shall be consistent with these findings, and as shall be 'just.'

according to the nature and amount of the provisions made after the date of the said marriage contract;

LORD CHANCELLOR.—My Lords, the cause in which William Miller and others are appellants, and Patrick Miller respondent, is certainly an extremely important cause. The appellants state their case thus:— They state that the late Mr. Miller, the father of the appellants, was a younger son; and then they proceed to state certain circumstances, which I think it is not necessary to trouble your Lordships with. There is a vast deal of correspondence referred to, prior in date to a deed which was executed, on which the question in this case principally turns. My Lords, all the previous correspondence I lay entirely out of the case, because I cannot conceive that any thing can be more dangerous than the construing deeds by the effect of letters and correspondence previous to the execution of them. It is stated, that it was originally proposed that the deed should have this clause in it:—'Declaring always, and it is 'hereby expressly provided and declared, that the said Patrick Miller 'senior shall have the free use and disposal of his whole property, both 'heritable and moveable, all the days of his life, and may borrow money 'on heritable security, and otherwise burden the same, as he may think 'proper, which shall be considered preferable to any security granted by 'this deed, and also the burden of such provisions as he has already 'made or may make in favour of his younger children or grandchildren, 'and also the burden of his debts; under which declaration and burdens 'these presents are expressly granted, and no otherwise, it being understood that the said Patrick Miller senior shall not alter the succession 'to his estate above mentioned, to the prejudice of the said Patrick Miller 'junior.' July 30. 1822.

My Lords, the correspondence was continued after this clause had been sent to the parties; and at last the deed was executed, on the construction of which the question arises:—'And in contemplation of the marriage, and for a provision to the said Patrick Miller during the lifetime 'of his father, and for the better enabling him to fulfil the foresaid obligation for securing the said Martha Cumming furth of the estate of Dalswinton, and also the better to enable him to make the provisions for 'the children after mentioned, the said Patrick Miller of Dalswinton 'hereby binds and obliges him, his heirs and successors whatsoever, to 'pay to the said Patrick Miller junior, during their joint lives, the sum of '£500 sterling yearly, but to be restricted during the first two years to 'the sum of £300; and thereto further binds himself, and his heirs and 'successors, to provide, secure, and dispone the estate of Dalswinton, and 'his whole other estate, real and personal, that may belong to him at his 'death, to and in favour of the said Patrick Miller junior, and the heirs-'male of his body of this present marriage; whom failing, the heirs-male 'of any subsequent marriage; whom failing, to the heirs whatsoever of 'the body of the said Patrick Miller junior of this present marriage; 'whom failing, to the heirs whatsoever of his body of any subsequent 'marriage;' whom failing,' to the appellants, and the heirs in their order, &c.; 'but with and under the burden always, however, of the debts of 'the said Patrick Miller senior, and provisions made by him for his

July 30. 1822. ' younger children and grandchildren.' He had made provisions previous to this marriage-contract; and one question between the parties is, Whether, by the words ' provisions made by him for his younger children and ' grandchildren,' he meant those provisions which had been made for the younger children previous to the execution of this marriage-contract; or whether the expressions ought to be construed as if the words should be ' provisions made or to be made?'

Your Lordships, however, will observe a difference between the expression in the actual marriage-contract, and of that clause which I have read to your Lordships in the first instance, namely, ' the burden of such ' provisions as he has already made, or may make.' After a great deal of procedure in the Court below, the Lord Ordinary pronounced this interlocutor—[His Lordship then read the interlocutor.]

The Case then proceeds to state the amount of the debts, the amount of the provisions, and a great variety of provisions which were made for the younger children after the contract of marriage was entered into.

My Lords, the Court pronounced this interlocutor—[His Lordship then read the interlocutor of the Inner-House.]—There were some subsequent proceedings that are likewise appealed from; but the substance of which it is not necessary to mention, as they are chiefly matter of form.

Your Lordships observe, that both the interlocutor of the Lord Ordinary and the interlocutor of the Court seem to proceed not merely upon the principle of construction of the settlement, but the Lord Ordinary refers to what he calls the reason and propriety in point of quantum of the provisions that are made after the marriage-contract; and he seems to hold that those provisions would be good, if, upon the whole, they were suitable to the circumstances and fortune of the father. That is altogether independent of the question arising upon the mere construction of the marriage-contract. The Court seems to differ from that—not in respect of the propriety of acting upon that principle—but in respect to the application of it; for it finds that the ' provisions made by the late Patrick ' Miller for his several younger children, before the date of the pursuer's ' contract of marriage of 5th October 1804, were suitable and adequate.' The Court, your Lordships therefore perceive,—not stating that they found their judgment upon the construction of the settlement, but upon the fact, that in their opinion the provisions were suitable and adequate,—go on to state, that ' in the whole circumstances of the state of the said Patrick ' Miller's affairs and fortune, after the date of the said contract, and down ' to the time of his death, it was not competent to him to make any addi- ' tion to the said provisions;'—having found, as they had, that the provisions were suitable and adequate at the time of the contract. They likewise appear to have investigated the circumstances, and the state of his affairs and fortune after the date of the contract; and regard being had to those circumstances, and the state of Mr. Miller's affairs and fortune after the time of the contract, and down to the time of his death, they held that, under those circumstances, it was not competent for him to make

any addition to those provisions,—meaning to give a judgment which would seem to imply that the Court was itself of opinion, that if the circumstances of the state of his affairs and fortune after the date of the contract, and down to the time of his death, had been different from what they were, it might have been competent to him to add to the amount. July 30. 1822.

My Lords, I should be extremely unwilling to enter into any discussion as to whether it is the principle in the Scotch law, that if the parties enter into a marriage-contract, it is competent to the Court of Session, or any Court, to say that the rights of the parties shall not be governed by that marriage-contract, but that the Court itself shall exercise the right and duty of looking into the affairs of the father, and to determine—not what the marriage-contract gives the parties—but what it might be reasonable on the part of the Court to say the father ought to have given those parties. I will not say one word more upon that subject; because it does not appear to me to be necessary in the present case, and that your Lordships may with great security ground your judgment upon the effect of the marriage-contract alone. What I would therefore propose would be, that your Lordships should find, &c.—[His Lordship then read the judgment which he proposed should be pronounced.]

This judgment, your Lordships will see, proceeds upon the construction of the marriage-contract; and proceeding upon that construction, I humbly offer it to your Lordships as my opinion, that the words in the marriage-contract must be taken to mean provisions made before that marriage-contract. You cannot construe these words as provisions made or to be made; and if the effect of the correspondence is looked to, (which I should hold to be a very singular thing,) it will be seen that that is what is intended.

My Lords, provisions were made by deeds of settlement after the contract for various amounts, and Mr. Miller's family were very many in number. The Court has not proceeded to state its opinion as to the validity or invalidity of those different provisions. It appears to us, therefore, that we should not run before the Court in so doing, and that the judgment of this House should go no further than to lay down the principle as to the construction of the instrument, and to leave it to the Court, after that judgment, to deal with the case as the principle of that judgment may require. For that purpose, I should propose, subject to these findings, to refer the cause back to the Court of Session to review the several interlocutors complained of, and to do therein as shall be consistent with these findings, and as shall be just.

My Lords, I can venture to assure your Lordships, that infinite attention has been given to this case. I hope we are finally right in this view of it. I am quite sure, if there is any error, it has not been for want of due care to avoid it; for I do not recollect a case to which I have given a more earnest attention than this.

J. CAMPBELL,—A. MUNDELL,—Solicitors.

(*Ap. Ca. No. 42.*)

No. 50. JOHN VANS AGNEW, Esq. of Sheuchan, Appellant.—*Gifford—Sugden—Greenshields—Jeffrey.*

JAMES STEWART and EBENEZER DREW, Esq. Respondents.—*Warren—Wetherell—Thomson—Keay.*

Entail.—Two parties having executed a mutual entail of their estates for onerous considerations, whereby they were conveyed to one of the entailers and his wife as the institutes, and a series of heirs-substitute, with a declaration that the entailer so instituted, and the succeeding heirs, should be bound to redeem any diligence which might be led against the estates for debts contracted by him prior to the entail; and infeftment having been thereafter taken in virtue of the entail; and the entailer so instituted having, subsequent to its date, contracted debts—Held, (reversing the judgment of the Court of Session,)

1. That the entail being onerous, the heirs substitutes thereby acquired a personal right to the estates, which was rendered real by the infeftment.
2. That it was not competent to attach the estate of the entailer so instituted for personal debts contracted by him subsequent to the date of the entail, and not made real prior to the infeftment;—and,
3. That it was attachable only for debts contracted prior to the entail, although not made real, in virtue of the clause ordaining the heirs of entail to redeem diligence led on such debts.

July 31. 1822.

2D DIVISION. Lord Pitmilly.

JOHN VANS, Esq. proprietor in fee-simple of the estate of Barnbarroch in the shire of Wigton, was, in the month of June 1747, privately married to Margaret Agnew, the only child of Robert Agnew of Sheuchan in the same county. This marriage gave offence to Mr. Agnew, and for several years he refused to have any communication with the parties. At last, in the beginning of the year 1756, a reconciliation took place, and it was arranged between Mr. Vans and Mr. Agnew that they should execute a contract of sale, marriage, and entail of their respective estates of Barnbarroch and Sheuchan. By Mr. Agnew's own contract of marriage, his estates stood destined to the heirs-male of his body, whom failing, to his own nearest heirs and assignees whatsoever; and he was bound to pay to his daughter a provision of £500; but he had no heirs-male of his body.

On the 29th of December 1757, accordingly, a deed was executed by Mr. Agnew and Mr. Vans, in which it was narrated that it was 'contracted, agreed upon, and finally ended betwixt 'Robert Agnew of Sheuchan on the one part, and John Vans 'of Barnbarroch on the other part, in manner, form, and to 'the effect following: That is to say, whereas the said John 'Vans and Margaret Agnew, only child to the said Robert 'Agnew, were married without any matrimonial contract be-'twixt them, whereby the said Margaret Agnew is not pro-'perly secured in a jointure, nor a settlement made upon 'the issue of the marriage, nor a suitable provision given 'to the said John Vans with his said spouse: And whereas,

'for remedying of these, the said Robert Agnew and John 'Vans have, after mature deliberation, and from weighty 'and onerous causes and considerations moving them, agreed 'upon and finally resolved to execute a mutual tailzie, by way 'of contract betwixt them, of the lands and estates presently be- 'longing, or that shall at any time after the date hereof happen 'to pertain and belong, or to fall and accresce to them, or either 'of them, and that to and in favour of the persons and of 'the heirs and substitutes of entail hereafter expressed, so as 'both estates may in all times hereafter go in one and the same 'channel, but that always with and under the reservations and 'conditions after mentioned. Therefore the said Robert Agnew, 'in implement of his part thereof, not only binds and obliges 'himself and his heirs and successors whatsoever to provide, 'secure, and make over to the said John Vans and Margaret Ag- 'new, his spouse, and longest liver of them two, whom failing, to 'the other heirs of tailzie after specified, heritably and irredeem- 'ably, the whole lands, teinds, tenements, and other heritable 'and real subjects which he shall at any time after the date 'hereof happen to purchase and acquire, or which shall fall and 'accresce to him, any manner of way whatever: But also he the 'said Robert Agnew, by these presents, gives, grants, alienates, 'and dispones to and in favour of the said John Vans and Mar- 'garet Agnew, spouses, and the longest liver of them two, and 'to the heirs and substitutes of entail hereafter mentioned, 'and the order and course of succession under written, herit- 'ably and irredeemably, all and whole his lands and estate of 'Sheuchan, comprehending the lands and other heritable sub- 'jects after mentioned.' And then there was a description of those lands and other heritable subjects. 'For the which causes, 'and for the sum of £3000 sterling advanced and paid by the 'said Robert Agnew to the said John Vans, John Vans 'binds and obliges himself, his heirs and successors whatso- 'ever, to provide, secure, and make over to and in favour 'of himself and the said Margaret Agnew, his spouse, and 'the longest liver of them two, and of the heirs and substi- 'tutes of entail, hereafter wrote, heritably and irredeemably, 'the whole lands, teinds, tenements, and other heritable and 'real subjects which he shall at any time after the date 'hereof happen to purchase and acquire, or which shall fall 'and accresce to him in any manner of way whatever: But 'also he the said John Vans, by these presents, gives, grants, 'sells, alienates, and dispones to and in favour of himself and 'the said Margaret Agnew, his spouse, and the longest liver of

July 31. 1822.

July 31. 1822. 'them two; whom failing, to the other heirs of tailzie and 'provision hereafter specified,' all and whole his estate of Barnbarroch. The deed contained an obligation by Mr. Agnew and Mr. Vans to infeft themselves and the heirs of tailzie, and also a procuratory of resignation for new infeftment to be 'made, given, and granted to John Vans and Margaret Ag-'new, his spouse, and the longest liver of them two, and the 'heirs-male already procreated, or which may hereafter be pro-'created, of the marriage betwixt them, and the heirs whatso-'ever of their bodies; whom failing, to the heirs-female already 'procreated or hereafter to be procreated of the said marriage, 'and the heirs whatsoever of their bodies; whom failing, to the 'heirs-male to be procreated of the body of the said Margaret 'Agnew in any subsequent marriage, and the heirs whatsoever 'of their bodies; whom failing, to the heirs-female to be pro-'created of the body of the said Margaret Agnew in said sub-'sequent marriage, and the heirs whatsoever of their bodies; 'whom failing, to the heirs-male already procreated or hereafter 'to be procreated of the body of Major James Agnew, son to 'Sir James Agnew of Lochnaw, Baronet, deceased, and the heirs 'whatsoever of their bodies; whom failing, to the heirs-female 'already procreated or hereafter to be procreated of the body 'of the said Major James Agnew, and the heirs whatsoever of 'their bodies; whom failing, to the said Robert Agnew, his 'other heirs-male, and the heirs whatsoever of their bodies; whom 'all failing, to the said Robert Agnew, his heirs and assignees 'whatsoever, the eldest daughter and heir-female of the heir or 'member of entail last in possession, whether such heir was served 'or not, and the descendants of her body, always succeeding 'without division, preferable to the heir-female of any former 'heir or member of tailzie, excluding all other heirs-portioners, 'the right of primogeniture taking place amongst the daughters 'or females, as by law established amongst the males, through-'out the whole course of succession above mentioned, and that 'absolutely and irredeemably, in due and competent form; but 'always with and under the reservations, powers, and faculties 'following.' Mr. Agnew reserved to himself the liferent of his estate, and a power to grant tacks for twenty-seven years. By the prohibitory clause it was declared, that 'it shall not be in 'the power of the said John Vans or Margaret Agnew, or any 'of the heirs or members of tailzie, to sell, alienate, impignorate, 'or dispone the said lands and estate, or any part thereof, whether 'irredeemably or under reversion, or to burden the same, in whole 'or in part, with debts, sums of money, infeftment of annual rent,

'or any other securities or burdens whatever, now to commit or 'grant any act or deed, civil or criminal, directly or indirectly, 'in any sort, whereby the said lands and estates, or any part there- 'of, may be affected, apprised, adjudged, forfeited, or become 'escheat and confiscated, or any other manner of way evicted 'from the heirs of tailzie, or this present entail, or the order of 'succession prejudged, hurt, or changed in any sort.' July 31. 1822.

By the irritant and resolutive clauses it was declared, 'That in 'case the said John Vans and Margaret Agnew, or any other of the 'heirs and substitutes, shall contravene the before-written condi- 'tions, provisions, restrictions, limitations, or others herein con- 'tained, that then and in any of these cases the person or persons so 'contravening shall, for him or her self only, amit, lose, and for- 'feit all right, title, and interest he, she, or they have to the said 'lands and estates, and the same shall become void and extinct, 'and the said lands and estates shall devolve, accresce, and be- 'long to the next heir of tailzie appointed to succeed, in the same 'manner as if the contravener were naturally dead, &c.; and 'further, with and under the express provisions, &c., that upon 'every contravention that may happen by and through the said 'John Vans and Margaret Agnew, or any of the heirs of tailzie 'aforesaid, their failing to perform all and each of the conditions, 'or acting contrary to all or any of the restrictions, (excepting 'only as is before herein excepted and allowed,) it is hereby ex- 'pressly provided and declared, that not only the said lands and 'estate shall not be burthened with or liable to the debts, deeds, 'acts, and crimes of the said heirs of tailzie, but also all such 'deeds, acts, and crimes contracted, granted, done, or committed 'contrary to the conditions and restrictions, or to the true intent 'and meaning of these presents, shall be of no force, strength, or 'effect, and shall be unavailable against the other heirs of entail, 'and who, as well as the said entailer, shall be noways burthened 'therewith, but free therefrom, in the same manner as if such 'debts and deeds had not been contracted, or such acts of omis- 'sion or commission had never happened or been committed.'

It was also declared, 'That in case any adjudication, apprising, 'or other legal diligence, shall happen to be obtained or used for 'or against the fee or property of the said lands and estates, or 'any part thereof, upon any debts or deeds of the said John 'Vans and Margaret Agnew, to be contracted or done by them, 'or either of them, after the date of these presents, or to be con- 'tracted or done by any other of the heirs and substitutes of 'tailzie, either before or after their succession to the said lands 'and estates, not only shall such adjudications, apprisings, or

July 31. 1822. 'other legal diligence, be void and null, in so far as may affect 'the lands and estates, or any part thereof, but also the said 'John Vans and Margaret Agnew, and the other heirs and 'substitutes of entail, upon whose debts, done or contracted 'as aforesaid, such diligence hath proceeded, shall ipso facto 'forfeit his or her right to the said lands and estates, and the 'same shall devolve, fall, and accresce to the next heir of tailzie, 'in such manner as if the contractor of such debts, or the granter 'of such deeds, were naturally dead; and that the said heir, 'and the said lands and estates, shall be free and disburdened 'of such adjudication, apprising, or other legal diligence, led 'and deduced thereupon.' This was followed by another clause, in relation to the debts previously contracted by Mr. Vans, and which is thus expressed:—'That neither the said John Vans and 'Margaret Agnew, nor any of the other heirs and members of 'entail aforesaid, who shall take or succeed to the said lands 'and estates by virtue of these presents, shall suffer or allow 'any special adjudications to pass against the said lands and 'estates, or any part thereof, for payment of the debts of the said 'John Vans contracted before the date hereof, or for payment 'of the real and legal burdens payable furth of the said estates, 'or for payment of any other debts to which the lands and 'estates may by law be subjected in any time hereafter.'—'And 'in case any general adjudication, apprising, or other legal dili-'gence, shall pass against the said lands and estates, or any part 'thereof, for payment of the said debts, or real or legal burdens, 'in that case the said John Vans and Margaret Agnew, and the 'heirs and members of entail respectively in possession of the 'said lands and estates for the time, shall be bound to redeem 'such adjudication or legal diligence within four years at most 'after the respective dates of such adjudication or legal diligence, 'and shall free and disburthen the lands therefrom in all times 'thereafter; and in case of their failing to redeem as aforesaid, 'then the lands are to devolve upon the next heir of tailzie, who 'shall have power to ascertain his right thereto in manner herein 'after specified, and who shall have immediate right, upon the 'lapse of the said four years, to redeem and purge the said ad-'judication.'

Power was given to the disponees and heirs of entail to feu certain parts of the estate, and to grant liferents to wives and husbands, and provisions to children to a limited amount, and then it was declared, 'That in case the issue male and female 'already procreated or hereafter to be procreated of the mar-'riage betwixt the said John Vans and Margaret Agnew, and

'the heirs whatsoever of their bodies, shall fail, so as the succes- July 31. 1822.
'sion shall devolve upon the heirs of entail next in succession to
'them, that then and in that event the heir upon whom the suc-
'cession shall so devolve is hereby expressly bound and obliged,
'with and under the exception and reservation hereafter wrote,
'immediately upon his succession, or whensoever legally thereto
'required, to renounce and denude, or to dispone, convey, and
'make over to and in favour of the heirs and assignees what-
'soever of the said John Vans, or his heirs or their assigns, the
'foresaid lands and estate of Barnbarroch, comprehending there-
'in the several grounds and others before recited; excepting and
'reserving therefrom as many of the lands and others compre-
'hended in the said estate of Barnbarroch, and those he the said
'John Vans shall purchase or succeed to, and lying most remote
'from the mansion-house or mains of Barnbarroch, as will, at the
'rate of twenty-three years purchase of the then current free rent,
'be equivalent and correspond not only to the above £3000
'sterling, advanced and paid by the said Robert Agnew to the
'said John Vans, but also to what further sums of money the
'said Robert Agnew shall at any time of his lifetime advance
'and pay over to the said John Vans, or leave and bequeath to
'him at his decease.'

It was also provided that John Vans and the succeeding heirs of entail should assume the name and arms of Agnew of Sheuchan; and in consideration of the provisions thus given, John Vans and Margaret Agnew renounced every claim which they had at law against Mr. Agnew. This deed, it was alleged, was revised and approved of by Mr. Macqueen, afterwards Lord Braxfield, whose wife was called as one of the heirs of entail.

From the period of its execution John Vans took the name of Agnew, subscribing himself on all occasions as John Agnew, and designing himself as younger of Sheuchan. His debts, at the time of its execution, (according to a report of an accountant afterwards obtained,) amounted to about £1481; but it was alleged by the appellant that they were overrated.

On the 18th of January 1758 the deed was, on the joint petition of Messrs. Agnew and Vans, presented to the Court of Session, and duly recorded in the Register of Tailzies.

Mr. Agnew died in the month of July 1774, having been predeceased by his daughter Mrs. Vans, and leaving, as was alleged, personal funds to the amount of £20,000. Soon after Mr. Agnew's death, John Vans executed the procuratory of resignation contained in the deed of entail, and obtained a charter in terms of it, in virtue of which he was infeft on the 20th of May 1775.

July 31. 1832.

John Vans died in June 1780, leaving three sons, Robert, Patrick, and John,—and two daughters, Robina and Barbara. With concurrence of his eldest son, he had made provisions in favour of the younger children, exceeding those allowed by the entail; and by a deed of settlement he nominated his eldest son to be his executor. The debts owing by John Vans at this time, and which were almost all personal, amounted, as was alleged, to upwards of £11,000, (independent of the provisions to his children, which extended to £3000,) the documents being signed by him under the name of John Agnew.

On his death, his son Robert assumed the name of Agnew; made up titles to the estates in terms of the entail; and was accordingly infeft on the 19th of October 1781. He had previously married Miss Dunlop of Dunlop, and the eldest son now alive of that marriage was the appellant.

In consequence of the large claims which existed against John Vans or Agnew, and which, it was said, his personal estate was inadequate to discharge, Robert became desirous to have the entail set aside, or at least to enable the creditors to attach the estate for payment of their debts,—he himself being a creditor to a considerable amount. In this it was alleged that the creditors concurred with him, and that mutual memorials were laid by them before Mr. Ilay Campbell, afterwards Lord President,—Mr. Maclaurin, afterwards Lord Dreghorn,—and Mr. Crosbie, for their opinions as to the possibility of setting aside the deed, and enabling the creditors to attach the estate. These lawyers accordingly gave opinions, in which it was said that they concurred in holding that, as there was no fraud, the entail was effectual to prevent the estate being adjudged for the debts subsequently contracted by John Vans or Agnew. *

Notwithstanding these opinions, the creditors resolved to institute judicial measures; and having assigned their debts to Messrs. Stewart and Drew as trustees, these gentlemen charged Robert to enter heir to his father; and he having declined to do so, except under the contract of entail, they obtained decree cognitionis causâ against him. They then raised an action, concluding that the entail should be reduced, as having been granted in fraudem creditorum, or at least that it should be found that all the debts of John Vans were effectual against his estate of Barnbarroch. To this action Robert and the heirs of entail in existence were called as defenders, among whom was the appellant, who at this time was about five years of age, and resided with his

* See these opinions quoted by the Lord Chancellor in his speech.

father. Lord Braxfield was appointed his tutor ad litem; and the case having come before Lord Justice-Clerk Miller, he reported it on informations to the Court, who, before answer, remitted to an accountant 'to make up from the books of the deceased John 'Vans, or from such other documents as shall be shown to him, a 'report of John Vans's debts at the different periods to be conde-'scended on by the parties.' He accordingly reported that his debts amounted, at the date of the entail, to £1481; at the date of infeftment, £9319; and, at the time of his death, £11,093, independent of the provisions to the younger children. On advising that report, with the informations, the Court, on the 3d of March 1784,* found, 'That the tailzie under reduction is still a 'subsisting deed, and repelled the reasons of reduction; but found 'that the estate of Barnbarroch is still affectable by the debts 'due by John Vans of Barnbarroch at the time of his death; 'and remitted to the Lord Ordinary to proceed accordingly.'† July 31. 1822.

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* See Morison's Dictionary, p. 15435.

† The following notes of the Judges' opinions have been preserved by Lord Hailes:—

Braxfield.—No fraud here;—the entail must subsist, but so as not to affect creditors. All debts contracted before recording infeftment must be good. This provided by the statute 1685, and this agreeable to the principles of the feudal law of Scotland. A personal deed of entail cannot qualify a right in a person by charter and sasine; 1751, Oliphant of Bachilton. But I incline to go farther. Prior to the statute 1685, entails were in use; but doubted how far, by the common law, a proprietor could lay such extraordinary burdens. The statute 1685 interposed to prevent such questions; it lays burdens on the heirs of tailzie;—but nothing in the statute which says that a man may tie up his own hands, possess the estate, and yet secure it from creditors;—that is contrary to the nature of property; and it would have been unlawful in the Legislature to do so. No one could make up a title to the entail, in case of the contravention of Mr. Agnew, the maker of the entail. A different case when the maker of the entail puts the fee in the heir, and reserves only a liferent. No difference that here a mutual entail;—that good among the persons contracting with him; but still the debts will be good quoad the creditors;—this determined in the case of Barholm.

Monboddo.—Have no doubt as to the validity of all debts prior to recording of the entail by infeftment. Nor have I any doubt even as to posterior contractions, for the limitations of the entail are only against the heirs of entail. No man can possess an estate without being liable to debts contracted by him, unless there be a provision to qualify right. No matter that here a mutual entail; that is merely a personal contract;—however onerous, it will not affect creditors who contract on the faith of the records.

Justice-Clerk.—I cannot perceive the principle which distinguishes mutual entails from simple entails. An onerous consideration for making the entail will not alter the nature of the right;—that may be a good obligation at common law to make the entail good, but will not affect creditors. All that they had to do was to look at Mr. Vans's titles, which contain no prohibition of irritancy.

Find the entail subsists, but that it cannot affect the just and lawful creditors of Mr. Vans.

July 31. 1822.

So far as Robert was concerned in this action, the appellant alleged that he was merely a nominal defender; and he referred to correspondence with his agents to show that he was colluding with the creditors, and was equally as desirous as they themselves were that they should gain their cause.

In consequence of this decision, an act of Parliament was applied for and obtained by Robert for selling parts of the estate in liquidation of the debts; and sales were accordingly made to a large extent. *

In 1809 Robert died, and the appellant, his eldest son, thereupon succeeded to the estate in virtue of the entail. By minority and absence abroad, it was still competent for him to appeal against the above judgment, finding the estate of Barnbarroch liable for the debts of John Vans at the time of his death; and he accordingly entered an appeal, on hearing which, the House of Lords, on the 24th of July 1814, ordered, 'That the cause be 'remitted back to the Court of Session in Scotland, to review the 'interlocutors complained of generally.' The case having been thereupon remitted by the Inner-House to Lord Pitmilly, he afterwards reported it upon informations.

On the part of the appellant it was contended,—

1. That as the deed contained effectual prohibitory, irritant, and resolutive clauses directed against John Vans for valuable considerations, and consented to by himself, and as it had been duly published, it formed a valid interdiction and inhibition against him at common law, independent altogether of the statute 1685, c. 22, so as to prevent him from thereafter contracting debts to affect the estate:—that it had been repeatedly decided, that if the fetters be applied to the institute or disponee, he is bound by them:—and that this, of necessity, arose from the operation of the common law alone, because the statute was meant to regulate only the succession of *heirs*, and not the present and immediate settlement of the estate upon the entailer or the institute, —the authority given by the statute being, 'to substitute heirs;'— and that, accordingly, entails had been given effect to prior to the date of the statute.

2. That as the deed was a contract of sale, marriage, and mutual entail, and proceeded on onerous causes, and particularly as a price in money had actually been paid by Robert Agnew, in consideration of the entail of the estate of Barnbarroch, each of the heirs thereby substituted became an onerous creditor under the entail, and so acquired a jus crediti:—that as infeftment had been taken in 1775, that jus crediti was rendered real, so

* See next Case.

that the right of the heirs of entail to the estate became preferable to that of any personal creditor of John Vans, excepting those creditors whose debts were executed prior to the date of the deed; and which exception arose,—not from the debts being contracted prior to its date,—but from the deed itself recognising the validity of diligence to be led against Barnbarroch for payment of them, and binding the heirs under a penalty to redeem. July 31. 1822.

3. That this was not a question between heirs and creditors, but between creditors having real rights under the entail, and personal creditors of John Vans; and that the terms of the prohibitory and irritant clauses were quite sufficient to prevent John Vans from thereafter contracting debts whereby to burden the estate.

To this it was answered by Stewart and Drew, on behalf of the creditors,—

1. That as the estate of Barnbarroch belonged to John Vans in fee-simple, and as by the deed of entail the property remained with him, he could not, consistently with the law of Scotland, do any act whereby to place his estate beyond the reach of the diligence of his creditors, and therefore that the judgment in 1784, finding Barnbarroch still affectable for his debts, was well founded:—that the proposition maintained on the other side that entails were valid, independent of the statute, was unfounded:—and that although the institute and disponee were not mentioned in the statute, yet it had been settled by decisions, that if the fetters were applied to them, they stood in the situation of heirs instituted, and came within the statute; and that as interdictions at common law were only available where they were executed in due and regular form by profuse or facile persons, and as John Vans was not of that description, the plea urged on this ground was untenable.

2. That there had been no such onerous cause as to entitle the heirs to the character of creditors, seeing that Robert Agnew was under obligations by his own contract of marriage towards his daughter; and as she was his heir at law, and so entitled to succeed to his estate, and she had a right of terce out of her husband's estate, the transaction was altogether gratuitous, and merely made to assume the form of onerosity, so as, if possible, to defraud the creditors of John Vans. And,—

3. That the prohibitory and irritant clauses were not effectual against third parties, because there was no prohibition against *contracting* debts, but merely against *burdening* the estate with debts; and besides, the irritant clause was directed against the heirs of tailzie only—an expression which did not include John Vans.

July 31. 1822. The Court, on the 2d of June 1818, adhered to the interlocutor pronounced on the 5th of March 1784, and found Mr. Agnew liable in expenses.* Against the above judgments Mr.

* The following opinions were delivered at pronouncing the above judgment:—

Lord Justice-Clerk.—A great deal is said in the papers of the unfavourable view taken by the House of Lords of the decrees obtained in 1784, but I see nothing of that in the judgment: it is neither more nor less than to allow the defender to be heard; and your Lordships are now to decide if you can at this late period alter the former decision. Notwithstanding the great labour and the long argument of the defender, I profess I see no reason to doubt the propriety and legality of the former judgment. It is quite clear, that on attending to the terms of the entail, or rather of the contract of marriage, and deed of entail therein contained, between Mr. Vans and Mr. Agnew in 1757, that deed cannot be countenanced for one moment, so as to deprive the creditors of their right of proceeding against the estate of Barnbarroch. On looking at the terms of the deed, though it is a mutual entail, and though there is, in regard to Mr. Vans, the introduction of the word 'sell' in that part of the deed, it is clear there is no foundation for the argument that the estate had been purchased by Mr. Agnew, or that it is to be held as an acquisition by him; for even with regard to the word 'sell,' Mr. Vans 'sells,' &c. to himself and the heirs called to the succession. I can pay no attention to such an agreement in reference to the creditors. By no contrivance whatever, even if it were deliberately intended to contrive a mutual contract for that purpose, could this gentleman's estate be withdrawn from the claims of his lawful creditors. This is a proposition requiring no argument, as it is supported by the whole law of Scotland. Looking at the state of his affairs, there were large debts owing by him at the time. Though the operation of recording the deed of entail was immediately carried through, yet, down to 1775, there was no alteration in the titles of Mr. Vans, but he just continued as the fiar of the estate. Then came the proceedings in this Court in 1784, and the question was, whether the entail could be set aside? The Court found that it could not be set aside; but that is qualified with the finding, that the estate continued affectable by all the debts due by him, and of course with the interest. The only question that remained was, the amount of the debts. These debts were made out in a satisfactory manner, and at last an act of Parliament was obtained, which comes more properly to be considered in the other case. But as to the main question here; as to the powers of this party to withdraw his estate from his creditors by the deed of entail, I have no doubt. I am for pronouncing a judgment now in ipsissimis terminis of the former judgment; especially when we recollect how the case was conducted; it was at least as well argued and determined as it can be now, by the greatest abilities that ever sat on this Bench.

Lord Robertson.—The question is, whether the estate of Barnbarroch was affectable by the debts of John Vans at the time of his death: or whether it was protected from these claims by the deed of entail? In order to examine this question, it is necessary to attend minutely to the terms of the deed of entail, and, first, as affecting the heirs of entail; and then, separately and distinctly, how it could affect the rights of the creditors.

Mr. Vans and Mr. Agnew possessed their estates in fee-simple; but, about the middle of the last century, Mr. Vans married the only daughter of Mr. Agnew, and some time after they entered into the mutual contract and tailzie now under consideration. The entail proceeds upon a narrative that John Vans and Margaret Agnew were married without any matrimonial contract, whereby the said Margaret Agnew was not properly secured in a jointure, nor a settlement made upon the issue of the marriage, nor a suitable provision given to the said John Vans with his said spouse; and for remedying these matters, the parties entered into this contract and mutual deed of tailzie.

Agnew having appealed, the House of Lords 'ordered and ad- July 31. 1832.
'judged, that so much of the interlocutor of the Court of Session

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By this deed, Agnew conveyed his whole lands and estate to John Vans and his wife, reserving only his own liferent; and Vans, in consideration of this conveyance, and £3000 made over to him by his father-in-law, conveyed the estate of Barnbarroch to himself and his wife. The destination of both estates is precisely the same, as long as there exist heirs of the marriage; but if these failed, the destination of the two are different, and a provision is made for the repayment of the £3000 which had been given to Mr. Vans.

This deed contains all the usual clauses, and was immediately recorded in the Register of Entails, and in the Books of Council and Session; but no infeftment took place upon it till 1775.

In these circumstances, I consider that the entail is strictly onerous; first, because it is a mutual entail, and each entail entered into in consideration of the other; secondly, because, from the preamble, which I have read, and other provisions, it is of the nature of a contract of marriage; and, thirdly, it is onerous, because it is granted in consideration of £3000 paid by Mr. Agnew.

In every question, therefore, between the parties to this deed and their heirs and representatives, it is onerous to all intents and purposes, and therefore not to be gratuitously defeated by Mr. Vans of Barnbarroch, or any heir in possession; and if Mr. Vans should burden it with debt, and have a separate estate, he might be made to free the entailed estate.

But we are not in a question with the heirs of entail, but in a question with these heirs and the just and onerous creditors of Mr. Vans; and the question is, How far the estate belonging to him was tied up against himself and the diligence of his creditors?

It is necessary to attend to the form of the conveyance. There is a distinction between the conveyance of the two estates. By this deed of entail, Mr. Agnew conveyed 'to and in favour of the said John Vans and Margaret Agnew, and the 'longest liver of them two, and to the heirs and substitutes of entail hereafter men-'tioned, in the order and course of succession under written, heritably and irre-'deemably,' &c. under the express reservation of the liferent of Mr. Agnew himself. So that Mr. Agnew was divested of the fee; he had nothing but the liferent. He was only liferenter, and could not have granted any lease to last longer than his own lifetime, except under a special liberty to let leases of 27 years.

There is a remarkable difference in the terms by which Mr. Vans disponed Barnbarroch; for there the conveyance is to Mr. Vans himself and wife, and the longest liver of them two; whom failing, to the other heirs of tailzie and provision therein after specified. So that, by the conception of this deed, the fee of Barnbarroch was completely vested in John Vans, and there was no necessity for reservation of liferent. The situation of Mr. Vans with regard to this estate is different from that of Mr. Agnew as to the other.

By the terms of this deed, the fee being conveyed to Mr. Vans, he continued in possession during his natural lifetime. No infeftment was taken till 1775; and no inhibition, no legal step of diligence, was taken by any party to limit his right, or make it different from what it was by the terms of the deed itself.

It is clear in the law of Scotland, and runs through the whole system of it, that the whole estate of every debtor is liable to be affected by the diligence of his creditors; and it is impossible for any man to have in his own person the fee of an estate,—to continue in possession of it, and at the same time by any deed or operation of his own, to prevent the attachment of it by his creditors.

On these grounds, I concur with your Lordship in opinion as to the debts contracted prior to the infeftment in 1775.

There is a separate question, How far, after the infeftment, the estate was liable

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'in Scotland, of the 3d of March 1784, as found generally that 'the estate of Barnbarroch was still affectable by the debts due 'by John Vans of Barnbarroch at the time of his death, be, 'and the same is hereby reversed; and the Lords find that such 'estate was affectable only by the debts of the said John Vans 'which were due at the time of the date of the deed of tailzie of 'the 29th day of December 1757, and which remained due at 'the time of his death, and such other debts of the said John 'Vans (if any) as had become real charges upon the said estate 'before the infeftment of the 20th day of May 1775. And it is 'further ordered and adjudged, that the said interlocutors of the '2d day of June 1818, and the 26th of February 1819, com-'plained of in the said appeal, be, and the same are hereby re-'versed. And it is further ordered, that the cause be remitted 'back to the Court of Session in Scotland, to do therein as may 'be consistent with this finding, and as shall be just.' *

Appellant's Authorities.—(1.)—2. Mack. 459; 3. Ersk. 8. 21; Hope's Min. Pr. 362; 3. Ersk. 8. 23; Stormont, Feb. 26. 1662, (13966); 1. Stair, 14. 5; 2. Stair, 3. 59; 2. Bank. 3. 141; 3. Ersk. 8. 24; Mackenzie, July 1. 1752, (15459, and Elch. No. 36. Tailzie); Don, Feb. 5. 1713, (15591, and Robertson's Ap. Ca. 76); Shaw, July 15. 1715, (15572); Gordon, Jan. 25. 1771; Syme, Feb. 27. 1799, (15473); 3. Ersk. 2. 4; 5. Bell on Deeds, 72; Robertson's Ap. Ca. 207. —(2.)—L. Advocate *v.* Creditors of Cromarty, April 10. 1759, (H. of L.)

Respondents' Authorities.—(1.)—Campbell, Dec. 22. 1622, (7159); Dickson, March 10. 1786, (15534); 1. Bell, 26; Kames' Law Tr. 150; Hamilton, March 3. 1815, (F. C.)—(2.)—Campbell, June 17. 1746, (15505); Nisbet, Nov. 1765, (15516); Edmonstone, April 15. 1771, (4409, rev. in H. of L.); Bruce, Jan. 15. 1799, (15539.)

FRASER,—J. CHALMER,—Solicitors.

(*Ap. Ca. No.* 43.)

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for the future debts contracted by Mr. Vans, the heir in possession? But I was much satisfied with the argument, that the irritant and resolutive clauses are not sufficient to tie up his hands. So that, upon the whole, I am for repelling the defences.

Lord Glenlee.—For my own share, it is inconceivable to me how any one can doubt the propriety of the judgment formerly pronounced.

It is stated that by the original law of Scotland it was quite competent to a man to tie up himself by irritant and resolutive clauses, but not to tie up his heirs, and that this made an act of Parliament necessary to authorize entails; but that no such thing was necessary for enabling him to tie up himself. There is a great extravagance in this idea. If that was the only argument omitted formerly, I am not surprised that it was omitted, for I dare say such an argument never occurred to mortal man before.

Lord Craigie.—I am entirely of the same opinion. I think not only that the irritancy was not properly against Mr. Vans, but that he had always the fee of this estate. It is far different from the case of an institute who takes it qualified from the proprietor. Mr. Vans had the right of property, and it was never taken from him.

* See the Lord Chancellor's speech at the end of the next Case, p. 343.

JOHN VANS AGNEW of Sheuchan, Appellant.—*Gifford—Sugden —Greenshields—Jeffrey.* No. 51.

JOHN EARL of STAIR and Others, Respondents.—*Ross—Warren —Wetherell—Thomson—A. Bell.*

Entail—Pupil—Judicial Sale under Act of Parliament.—Held, (reversing the judgment of the Court of Session,)—1.—That sales made of part of an entailed estate in a process raised in virtue of an act of Parliament, requiring the heirs of entail to be called as parties, were inept, the next succeeding heir having been cited, but being a pupil, and no tutor ad litem having been appointed; and,—2.—That it was not a sufficient defence that the warrant of his appointment could not be required to be produced, as twenty years had elapsed, there being no statement in the extracted decree, or a recital of an interlocutor, that a tutor ad litem had been appointed.

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2D DIVISION.

Lord Pitmilly.

AFTER the Court had found, (as mentioned in the preceding case,) that the deed of entail executed by John Vans and Robert Agnew of their respective estates of Barnbarroch and Sheuchan was effectual, but that Barnbarroch was liable to be attached for the debts due by John Vans or Agnew at the time of his death, his son Robert (who had succeeded to the estate, and against whom that process had been instituted) brought an action for authority to sell such parts as should be necessary; but it was dismissed by the Court, in respect they had no power to order a sale at the instance of an heir substitute. He then, in 1785, applied for an act of Parliament to authorize him to sell such parts of the estates of Barnbarroch and Sheuchan as might be sufficient for payment of the debts of John Vans. An act was accordingly passed, proceeding on a recital of the entail, and of the judgments of the Court; that the rents of the estates were inadequate to keep down the interest, and discharge the debts; that several of the creditors were proceeding to lead adjudications, and that it would be for the benefit of the heirs of entail that parts of the estates should be sold for payment of these debts. The enacting clause then proceeded in these terms:—'Upon the humble petition of Robert 'Agnew, now of Sheuchan, Esq., for himself, and as administrator 'in law for Robert, John, James, and Patrick Vans Agnew, his 'four sons, and Margaret, Frances, and Georgina Vans Agnew, his 'daughters, all infants, and of Patrick Agnew, Esq., his brother,— 'that it may be enacted, that it shall and may be lawful to and 'for the Judges of the Court of Session in Scotland, upon an 'action to be instituted in the said Court in the name of the said 'Robert Agnew, now of Sheuchan, Esq., or in the name of any 'other heir of entail in possession of the said entailed estates for 'the time, against the other heirs of entail then in being, to in-'quire into and ascertain the extent and amount of the debts

July 31. 1822. 'owing by the said John Vans Agnew at the time of his death, 'and chargeable upon or effectual against the said entailed estates, 'or any of them; and after having fixed and ascertained the 'extent of such debts by interlocutors or judgments in that be- 'half, to allot, order, and direct the detached parts and portions 'of the aforesaid lands and estates of Barnbarroch, comprised in 'the aforesaid deed of entail, and settled pursuant thereto, to be 'sold for payment of the said debts; and if the price arising 'from such sale shall not be sufficient to discharge the whole of 'the said debts so to be ascertained as aforesaid, then and in that 'case to allot, order, and direct such of the disconnected parts of 'the aforesaid estate of Sheuchan, comprised in the said deed of 'entail, and settled pursuant thereto, to be sold for payment of 'the remainder of such debts; such sale or sales to be made by 'and under the direction of the said Judges of the Court of Ses- 'sion, in such way and manner as shall appear most likely to be 'attended with least detriment or disadvantage to the said en- 'tailed estates, and to the said Robert Agnew, and the other 'heirs of entail thereof: And for carrying such sale into execu- 'tion, to take proofs of the value or number of years purchase 'such parts of the said estates as shall be judged most proper to 'be sold ought to be exposed to sale at; and to award letters of 'publication or intimation of sale or sales, and to settle and ad- 'just the articles and conditions of sale or sales, and to sell or 'order to be sold such parts and portions of the said lands and 'estates, or either of them, as shall be judged most proper and 'necessary for the purposes of this act, in such lots or parcels as 'they shall think fit; and to adjudge the lands and estates so to 'be sold, and the inheritance thereof, to the purchaser or pur- 'chasers thereof, his, her, or their heirs and assigns, in fee-simple; 'and in general to pronounce such interlocutor or interlocutors, 'and to have and hold such proceedings, as the said Judges are 'in use to pronounce and to hold in and concerning processes or 'actions of sale of the estates of bankrupts; and to pronounce 'such other interlocutors, and to order, direct, and hold such 'other proceedings, as to them shall seem proper and necessary 'for effectually carrying this act into execution, any thing in the 'said deed of entail, or the investitures following thereon, or any 'law or usage to the contrary, notwithstanding.' And further, 'That the purchaser or purchasers of the lands and estates under 'the authority of this act, his, her, and their heirs and assigns, 'shall, by the decree or decrees of sale thereof, have good and 'effectual title to the lands and estates so to be purchased, free 'and clear, and freely and clearly exonerated, acquitted, and dis-

'charged of and from the prohibitions, limitations, and irritancies July 31. 1823.
'of the said entail, and of and from all the debts and deeds of
'the entailers, their heirs and successors, and every of them, and
'of and from every other debt, encumbrance, defect of title, or
'ground of eviction whatever, in as full, ample, and beneficial a
'manner, to all intents, constructions, and purposes whatever, as
'any other purchaser or purchasers of lands and real estates at
'judicial sales before the Court of Session may, can, or ought to
'have by the law or practice of Scotland.'

Immediately on obtaining this statute, an action of declarator and sale was raised by Robert Vans Agnew against the heirs of entail then alive. Those who were next entitled to succeed were his own children, who were all in minority, and resided with him at Barnbarroch in the county of Wigton. In particular the appellant, who was at that time the second son, was only about five years of age. An execution of the summons was returned, bearing that these minor children had been cited at their dwelling-place, and their tutors and curators edictally at the market-cross, not of the head burgh of the county of Wigton, but at that of Edinburgh. The summons was then called; and although a tutor ad litem had been appointed to them in the process of reduction, (which was terminated by the judgment of the Court in 1784, and which had been extracted,) yet it did not appear that any tutor ad litem was nominated on their behalf in this action of declarator and sale.

On the cause coming before the Lord Ordinary, his Lordship allowed a proof of the rental and the value of the lands, and thereafter made a remit to an accountant to inquire into the validity of the debts. That gentleman having reported several objections, appearance was made for Mrs. Kennedy, a sister of Robert Vans Agnew, and her children, who were heirs of entail, but none was made for his own children; and a debate before the Lord Ordinary took place. Great avizandum was then made with the memorial and abstract in common form, and the Court, on the 11th of March 1788, pronounced an interlocutor of roup, in which they estimated the value of four lots of the entailed lands at £11,590, and the debts, as in a list subscribed by the Lord President, at £12,200, and authorised certain parts of the estate of Barnbarroch, and also of Sheuchan, to be sold for payment of these debts. An act of roup was accordingly extracted; and the lands being exposed to sale, were purchased, in August 1788, by the respondents or their predecessors.

Among the debts for which these lands were sold, there were not included those which had been objected to by the accountant,

July 31. 1822. nor the provisions which had been granted by John Vans to his younger children, amounting to upwards of £3000; and the Lord Ordinary, on again hearing the pursuer, Robert Vans Agnew, the creditors whose claims were objected to, and Mrs. Kennedy and her children, ordered informations to the Court. Informations were thereupon lodged, including one in the name of the appellant, and the other children of Robert Vans Agnew, and of Lord Braxfield as their tutor ad litem.

The Court, having repelled the objections, remitted the case again to the accountant; and he having made another report, containing a scheme of division, and an allocation of the debts on the several purchasers of the lots which had been sold, the Court, on the 18th of December 1789, pronounced a decree of sale in favour of the respective purchasers, and finding, inter alia, the subjects sold to be 'for ever thereafter free from the prohibitory, 'irritant, and resolutive clauses contained in the entail thereof 'executed by Robert Agnew of Sheuchan, Esq. and John Vans 'of Barnbarroch, Esq., and dated the 29th day of December '1757, and also to be free and disburdened of all debts and deeds 'of the said Robert Agnew and his predecessors and authors, and 'from all other debts, rights, encumbrances, and grounds of evic-'tion; and that the heirs, apparent heirs, or creditors of the said 'Robert Agnew or his predecessors, and all others having or pre-'tending to have right in the foresaid subjects, without excep-'tion of minority, not compearing, conceiving themselves to be 'prejudged, shall only have access to pursue the receivers of the 'price and their heirs, reserving to the minor lesned his relief, as 'accords.' This interlocutor was followed by one of ranking of the creditors on the prices which had been consigned by the purchasers.

Thereafter another part of the estates was sold for payment of the remaining debts, including the provisions which had been made by John Vans in favour of his younger children; and a decree of sale, in terms similar to the above, was pronounced on the 9th of June 1793. These decrees were extracted of their respective dates; and the purchasers, having received assignations from the creditors to their debts and clauses of warrandice, were infeft, and entered to possession of the lands.

Robert Vans Agnew died in 1809, and was succeeded by the appellant, who was now his eldest son, and who, by reason of minority and absence, was entitled to appeal against the judgment of 1784, finding the estate of Barnbarroch attachable for the debts of his grandfather, John Vans, at the time of his death. He accordingly appealed against that judgment, and also against

the interlocutors which had been pronounced in the action of declarator and sale under the act of Parliament. In the former of these appeals, a remit was made to the Court of Session to review the judgment; * but in the latter it was found 'not competent, 'in the circumstances of this case, to affect the purchasers by the 'proceedings of the appeal;' and it was therefore ordered and adjudged that the appeal be dismissed, 'reserving to the appel-'lant such relief, if any, as he may be entitled to in any other 'mode of proceeding.' July 31, 1822.

He thereupon instituted an action of reduction-improbation, declarator, and damages, concluding, alternatively, either that the sales should be reduced, and the lands restored to him, along with the rents from the period of his succession to the entailed estate,—or that, if he should not be found entitled to them, that the representatives and personal estate of Robert Vans Agnew should be found liable in damages. To this action he called as parties the whole purchasers of the entailed lands, and also the trustees and representatives of Robert Vans Agnew. The case having come before Lord Pitmilly, his Lordship found 'that the de-'fenders cannot be required, at this distance of time from the 'date of the decrees of sale, to produce the warrants thereof, 'though they must produce the grounds of the decrees,'—made avizandum to the Court, and granted certification contra non producta in usual form. Thereafter the case having been remitted back to him, he reported it on informations.

In support of his conclusion of reduction, the appellant rested upon a great many objections to the proceedings, which, with the exception of those on which the ultimate decision was pronounced, it is unnecessary to notice. He maintained,—

1. That as it was required by the act of Parliament that the action should be directed 'against the other heirs of entail 'then in being,' it was essentially requisite that they should be regularly called as parties to that action; but that although the appellant and the other children were the heirs next entitled to succeed after their father, and were in pupillarity, yet they were cited at their dwelling-place as if they had been of full age, and there was no citation of their tutors and curators at the market-cross of Wigton, the head burgh of the shire where they resided, so that they had not been called in terms of law, and consequently the whole proceedings were fundamentally null and void, as not being consistent with the act of Parliament.

2. That supposing the citation were unobjectionable, still it was

* See the preceding Case.

July 31. 1822. absolutely necessary (more especially as their father was pursuer of the action) that a tutor ad litem should have been appointed to act on their behalf:—that although such a tutor was appointed to them in the action of reduction, yet his office came to an end on the termination of it; and as there had not been a nomination of a tutor in the process of declarator and sale, the proceedings were inept on this ground; and were also contrary to the act of Parliament, which required that the heirs of entail in being should be parties to the cause agreeable to law. And,—

3. That it was proved by the extracted decrees of sale, on which the titles of the respondents were founded, that these proceedings took place in absence of the heirs, and without being duly called, and therefore the respondents must be held to have been fully aware that the terms of the act of Parliament had not been complied with.

In defence, it was contended by the respondents,—

1. That as twenty years had expired from the date of the decrees of sale, and as the execution of citation, and the interlocutor appointing a tutor ad litem, were merely the warrants of the decrees, they were not bound to produce them, so as to show that the appellant had been regularly called as a party, and that a tutor ad litem had been appointed, that it must be presumed that every thing had been correctly done; and this the more especially, as an information had been lodged for the appellant and the other children, and for Lord Braxfield as their tutor ad litem.

2. That the objection to the regularity of the citation (even supposing that the above defence could be overcome) was not well founded, because, as the appellant's father was alive, he could have no other tutors or curators, and therefore a citation of them, either at the head burgh or elsewhere, would have been incongruous and absurd.

3. That, at the utmost, the appellant was only entitled to be reheard, as in the ordinary case of decrees in absence. And,—

4. That as the act of Parliament declared that the decrees of sale should have the same effect as if pronounced in a judicial sale, the only right of relief which the appellant could have was in virtue of the statute 1695, cap. 6, which protected the purchasers, and merely reserved to the heir conceiving himself injured a right of recourse against the receivers of the price.

To this it was answered by the appellant,—

1. That if it had appeared on the face of the extracted decrees of sale that he had been duly cited, and that a tutor ad litem had been appointed, he would not have been entitled to object to the

proceedings, or to call for the warrants after the lapse of twenty years, but that the extracted decrees expressly bore that he had been cited in the manner stated; and not only made no mention whatever of the appointment of a tutor ad litem, but stated that they had passed in absence; and therefore he was entitled to maintain that he had not been duly made a party in terms of the act of Parliament. July 31, 1822.

2. That such being the case, the defence rested on the statute 1695 was unavailing, as no sale could be made except by virtue of the act of Parliament, which had been substantially violated; and that at all events the statute 1695 only applied to heirs representing the bankrupt, whereas the appellant took the estate as a singular successor. The Court, on the 2d of June 1818, 'sustained the defences pleaded for the defenders, repelled the reasons of reduction, and assoilzied them from the whole conclusions of the action,' and found the appellant liable in £360 of expenses.*

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* In pronouncing the above judgment, these opinions were delivered:—

Lord Glenlee.—We have nothing to do here with the alleged disposal of part of the proceeds in provisions to the family of Robert Vans Agnew. What the pursuer may have to say as to that, we are not called upon to notice at present. This is a question with the purchasers, and I see no ground for reduction. There is only one thing that could have raised a difficulty in my mind. If the pursuer could show that less land should have been sold, or that the best ways had not been taken to get proper prices, in one view he might still be reponed, so as to have them sold over again; but it would have required him to stand in a very different situation. What I mean is, the neglect of the appointment of a tutor ad litem; that was a fatal blunder, if stated tempestive; for it is out of doubt that it was essential, even under the act, that the proceedings themselves should have been regular; and it is quite plain, if we were at liberty to go upon what we see now, that it is probable there was no tutor for the children in the process. It is said that Lord Braxfield was the tutor, and that the Court held this to be the case; but the Court could not do so without a regular appointment. It appears to me that now it is not in our power to go into that. There is a distinction between the grounds of a decree and the warrants of steps in the course of a process. Such interlocutors are warrants, not grounds of the decree, and they are not entitled to investigate them, as every thing is presumed to have been rite et solenniter actum. Such an appointment may have been made, and the evidence of it lost. After twenty years and a final interlocutor, a mere warrant is not to be asked after; it is vain to speak of it; and that answer would apply to almost all the irregularities that are charged, if they are all warrants of the decree.

Lord Robertson.—When I first read the papers in this case, it appeared to me difficult upon this ground, that the sale was conducted under authority of a special act of Parliament. We were acting as commissioners under that act, and that act is the measure and rule of our powers; and therefore it appeared to me at first, that where the Court had not strictly attended to the different provisions, in order to secure a fair and proper sale of part of the estate for the purposes specified, that such irregularities must be fatal to the whole proceedings. In the case of the Marquis of Tweeddale against Downie, you held that the provisions of the act were imperative, that such an irregularity was fatal, and that it was not incumbent upon

July 31. 1822. Mr. Agnew having appealed, the House of Lords ordered and adjudged, 'That the said several interlocutors complained of be, 'and the same are hereby reversed. And it is declared that 'the appellant, and the other children of Robert Vans Agnew, 'who were named as defenders in the action of declarator and 'sale, raised at the instance of the said Robert Vans Agnew, ap-

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the challenger to specify any damage arising from it. But, on considering further, I came to be of Lord Glenlee's opinion, that whatever effect we might have given to irregularities, and particularly to the non-nomination of a tutor to the young boy—whatever effect we might have given to this objection de recenti, it is a different question how far it is admissible at such a distance of time, when there is no probable allegation of fraud on the part of the defenders.

Now, are we, at the distance of thirty years, on such an omission, which is not the ground but the warrant of the decree—when it is provided by this act that any sale that shall take place under its authority, and any title given to purchasers, shall be of the same force and validity as a decree of sale, (which we all know to have been held to be the best and firmest title in our law,)—are we, in the face of such a declaration in the act under which the proceedings were conducted—are we to overset a sale having all the effect of a judicial decree of sale, on such a ground as I have stated?

It is very true, that if a decree of sale has not been followed by forty years possession, it may not be a prescriptive title sufficient to bar a claim of eviction preferable to the bankrupt, but it is sufficient against any objection such as that brought forward.

Lord Craigie.—I am of the same opinion with those who have spoken; but I do not carry the objection so far as to the tutor ad litem. I do not think it annuls the proceedings, but it gives the minor a right to state the objections that might have been stated, if he had had a tutor; and if the plea had been stated with good objections, there might have been something in it. But I do not think the objections stated should have any influence at all.

Lord Bannatyne.—The proceedings against a minor without a tutor cannot be good. That is my objection to the proceedings.

Lord Justice-Clerk.—So far as any objection in this branch of the litigation is rested on the supposition of sums being taken into account for which the estate was not liable, I cannot enter into it at all, for we have found that the whole debts affected that estate; so that all that reasoning must go for nothing in this question. The question is certainly one of importance, because the powers which the Court exercised were conferred by special statute, and it does require attention from you to say whether the act has been executed in the way and manner required. In deciding as to the validity of these sales, you will recollect how the estate stood before the act of Parliament. After the opinion of the Court was given, that the lands were affectable by the debts, authority was asked from the Court by the heir to sell the lands, in respect he could not maintain his family and pay the interest of the debts; but the Court, looking to the entail, and not questioning their judgment as to the debts affecting the estate, found they could not give effect to the application by the heir alone. Adjudications were in cursu, but there was no application by the creditors for a sale. It was then necessary to apply to the Legislature, in order to discharge the debts which had been found to affect the estate, and this act was obtained.

Something was said, that the requisite steps by the standing orders of Parliament were not observed as to the heirs of entail. But Parliament must be presumed to have gone through all the solemnities required by themselves. A remit was made

'pearing on the face of the proceedings, to have been minors 'at the several times of pronouncing such interlocutors re- 'spectively, and not to have been properly brought before the 'Court as defenders in such action, according to the provi- 'sions of the act of Parliament in the said action mentioned, 'the Court had no authority to pronounce any interlocutor in

July 31. 1822.

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to the Judges,—the regular consent of the heirs obtained, and therefore to the objection upon that head we can pay no attention. We must suppose the act obtained bonâ fide. The sanction of the Legislature was received, and the act passed.

That act proceeded to direct that an inquiry should be taken by the Court of the debts that affected the estate of Barnbarroch, and it goes on to authorize sales, certainly in the first place, of detached parts of Barnbarroch; but, secondly, if these were not enough for payment of the debts, then of such parts of Sheuchan as might be necessary; making a provision, that in case of a surplus, it should be laid out in the purchase of lands, so that the heirs of Sheuchan should derive the advantage of it, and not the heirs of the other estate. That was the leading feature of the act, and it is said the Court did not proceed even then to execute the act correctly; but, on looking into the procedure, there seems to be no foundation for this statement. After the judgment in the former process, a list of debts was made out, and signed by the President, stating the debts to amount to £12,000. Every thing was brought before the Court, and deliberately considered;—particular objections were made to certain bills;—a remit was made to an accountant, and reports upon every thing were made out and authenticated by the President. I for one, therefore, can lay no stress upon that part of the argument, that the Court had not made due inquiry. I must hold they did so, from what I have stated.

It is then maintained that there was another deviation from the act of Parliament, by not directing Barnbarroch to be sold first, before sanctioning the sale of any part of Sheuchan, for the liquidation of the debts. But it is obvious from the proceedings, that after having ascertained the amount of the debts to exceed £12,000, and after ascertaining the value of the only lot of Barnbarroch remaining unsold, the Court had before them demonstrative evidence that a sale of the lot of Barnbarroch would not be adequate to discharge the burdens found to affect the estate, which the Court held to be res judicata. They saw that the sale of that part of Barnbarroch would not give effect to the act of Parliament, and they then authorized an inquiry as to the parts of Sheuchan that should be sold for the liquidation of the debts. That part of Barnbarroch not being nearly adequate, there were three lots of Sheuchan found necessary for that object, according to the evidence; and, as the Court do in every case where they authorize sales of entailed property, an authority was granted for intimation of the sales.

There is another objection stated, (I am satisfied that all hitherto was regular,) that when the sale did take place, instead of following literally the injunction of the act, in selling Barnbarroch first, and then proceeding to Sheuchan, in point of fact, the three lots of Sheuchan were sold first, and Barnbarroch in the second place. At first sight, this might appear a deviation from the act of Parliament; but, on deliberately considering the full evidence the Court had, corroborated by the subsequent sale, that the lot of Barnbarroch could not effect the object of the act, there does not appear any reason for this objection, though we were authorized merely to execute the act. But if, in fact, no more land was sold than was necessary to discharge the debts, this slight deviation of the proceedings was not such a deviation as can sanction your Lordships, at this distance of time, to overturn these sales.

Then we are told there is another objection, which is, that though in the former

July 31. 1822. 'such action affecting their interests, and especially had no au-
'thority to proceed to a sale of any of the lands of Barnbarroch
'or Sheuchan in the said act mentioned; and therefore, that all
'the proceedings in the said Court in the said action of declara-
'tor and sale, so far as the same affected the interests of such
'minors in the said estates respectively, under the deed of entail
'in the said act and in the said proceedings mentioned, were pro-
'ceedings without the authority for that purpose required by
'the provisions in the said act of Parliament, and were therefore

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process the Court had appointed Lord Braxfield tutor ad litem to the children, there was an omission of going through the ceremony again in the proceedings that followed. As far as we can see, I agree in thinking that there is not any ground for saying that there was any such appointment; it had escaped the man of business and the Court. But I must fairly own, that though unquestionably such an appointment is preliminary, in a litigation going on here, to make the proceedings effectual, yet, in the circumstances which occurred, I am not at present prepared to say, that the non-appointment of a tutor ad litem is sufficient to nullify the proceedings even under this act of Parliament. If it had been stated that injury had ensued from this circumstance, and if a challenge had been brought in time, the Court might have been called upon to inquire into the matter, and it might have given room to be heard. But now, at the distance of thirty years, without there having been a murmur or doubt as to the regularity of the proceedings, to say that, because there is not evidence of a tutor ad litem having been appointed, the sales should be reduced, and that this mere omission nullified the proceedings, is a proposition to which I cannot assent. On the contrary, I agree with you, that even giving full effect to the argument from the act of Parliament, there was not such a deviation from it as to nullify the proceedings.

And it is quite out of the case to suppose there could be the least suspicion of fraud or collusion on the part of those purchasers. I never saw a more feeble attempt made to bring forward such a charge of fraud or collusion. It is a strange act of imagination to suppose that some of the first noblemen and gentlemen of this country were in a conspiracy to ruin this estate.

But there is not a condescendence of any one circumstance to create even a doubt that the purchasers were in bonâ fide, or that the Court had not done every thing that was right under the act of Parliament; and that is a material circumstance in considering what is due to a challenge brought at this late period. We cannot listen to this objection, more than to the other objections at which I have glanced, that the Judges did not proceed in the very order mentioned in the act of Parliament.

There is still one part of this case which I have to notice. This gentleman in his information makes loud complaints of injustice done him by his near relations and the personal representatives of his father. There is no appearance for them here. The present case is as to the purchasers alone. We are not called upon to give any opinion on that question. But whatever may be the opinion on that question, it cannot affect bonâ fide purchasers. Neither the representatives of Mr. Vans, nor of David Balfour, are before us. Loud complaints are made; but these cannot affect the cause of the bonâ fide purchasers—they are not implicated in what is said to be irregular.

And on the other parts of the case I see no grounds for reducing those purchases. Every thing was regular under the act. Though there was one unimportant deviation from it, truly and substantially the act was followed out by the Court.

'null and void as against the appellant and the several other 'minor heirs of entail; and particularly that the sales made by 'the said Court, in pursuance of the several interlocutors pro- 'nounced by the said Court in such action of declarator and 'sale, were null and void as against the appellant and the said 'several other minor heirs of entail; and that the appellant, on 'behalf of himself and the said several other minor heirs of en- 'tail, is entitled to have the sales made under the several inter- 'locutors aforesaid reduced, and to have the lands restored to 'him, along with the rents from the period of his accession to 'the entailed estates, subject to such proceedings as may be had 'in an action to be instituted in the said Court, under the au- 'thority of the said act, for the purpose of inquiring into and as- 'certaining the extent and amount of the debts owing by the 'said John Vans Agnew at the time of his death, chargeable 'upon or effectual against the said entailed estates, or any of 'them; to the end that the said Court, after having fixed and 'ascertained the extent of such debts by interlocutors or judg- 'ments in that behalf, may proceed to the sale of such parts of 'the said estates respectively as may be necessary, in such order, 'manner, and form as directed by the said act: And it is there- 'fore ordered and adjudged accordingly; and it is further ordered, 'that the cause be remitted back to the Court of Session in Scot- 'land to execute this judgment, and further to proceed as shall 'be consistent with this judgment, and as shall be just.'

July 31. 1822.

LORD CHANCELLOR.—In the causes, my Lords, in which Mr. Agnew is appellant, the first appeal brings into question a judgment of the Court of Session, which, I think, was delivered so long ago as the year 1784. The other appeal brings into question the titles of purchasers, many in number, to lands which they assert to belong to them, under the operations that have been carried on in the Court of Session, in the execution of a private act of Parliament.

My Lords, an entail appears to have been made, the substance of which it will be necessary to state very accurately to your Lordships, without entering now into the antecedent history of the parties, who appear upon this entail to have been married; and without stating more than that the father of the lady seems for some time to have been very unwilling to be reconciled to the husband that she had chosen, it appears that at length they executed what is called a mutual contract of tailzie.—[His Lordship then read the narrative and dispositive clauses, see ante, p. 320-21.]—I observe, as I pass along, that it has been stated in answer to this recital, that the lady would have been entitled to her terce, and that she would have been entitled to the sum of £500. Your Lordships will also observe, that Mr. Agnew binds himself to make over his lands, not to John Vans, but

July 31. 1822. to John Vans and Margaret Agnew. You will also notice, that in the dispositive clause Mr. Agnew makes use of these words, 'gives, grants, 'alienates, and disponeș;' and that John Vans, after acknowledging the receipt of £3000 as part of the consideration, 'gives, grants, *sells*, alien-'ates, and disponeș.'

Then there is a specification of his lands:—'In the which lands and 'estates of Sheuchan and Barnbarroch aforesaid, comprehending therein 'the several lands, tenements, and others above disponed, the said Robert 'Agnew and John Vans bind and oblige themselves and their heirs, as 'well male as of line, tailzie, conquest, or provision, and all others their 'successors whatsoever, jointly and severally, for their respective concerns, 'renouncing the benefit of the order of discussing them, but under the 'limitations and conditions after specified;' then the manner of infefting Vans and his spouse and the other heirs of tailzie is pointed out:—'For expediting the said infeftment by resignation, the said Robert Agnew 'and John Vans, by these presents, make and constitute [certain persons] 'and each of them, jointly and severally, their very lawful and irrevocable 'procurators, for them and in their names to resign and surrender, as 'they by these presents, for their respective interests, but with and under 'the reservations and conditions after mentioned, resign, give up, and sur-'render all and whole the foresaid lands and estates of Sheuchan and 'Barnbarroch, comprehending therein the particular lands and subjects 'above disponed, lying in manner foresaid, and herein held as repeated, 'brevitatis causâ.' This is the usual procuratory of resignation.

Then, with respect to the destination to the heirs of entail, it is to be 'made, given, and granted,' &c.—[His Lordship then read the terms of the clause, ante, p. 322.]

So that your Lordships see here that Robert Agnew gives, grants, alienates, and disponeș, and Vans gives, grants, sells, alienates, and disponeș to Vans and his spouse, for their joint lives, and the life of the survivor of them, with limitations to the issue, male and female, of that marriage, and with limitations subsequent to these to the issue of Margaret by any other marriage, and subsequent to that limitation again to the family of Agnew, under the names by which they are here described,—Mr. Agnew professing to give, grant, alien, and dispone his estates, to be taken by those persons in their respective order,—Mr. Vans purporting to give, grant, sell, alien, and dispone his estate, so as first to go to the heirs of the marriage, and then afterwards in effect to be secured to Mrs. Agnew's family. Then there is a reservation to Agnew himself of a liferent, with power to grant tacks for twenty-seven years. Then there follow provisions binding on the disponees and the heirs of entail. When I say 'the heirs of entail,' I mean to say nominatim, not under the general expression of heirs of entail, but by name, 'that they are to hold and possess the lands entailed 'by virtue of this tailzie, and by no other title,' to procure themselves timeously entered and infeft in the lands; to engross conditions, restrictions, irritant and resolutive clauses, in the charters and infeftments; restrictions and limitations binding upon the disponees, 'naming the dispo-

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'nees again and the heirs of entail,' not leaving it to construction whether the disponees are heirs of entail,—whether the words 'heirs of entail' will amount to a description of disponees, but expressly naming them, 'not to 'alter or change the tailzie or order of succession, nor to sell lands, nor 'to burden the same with debt, nor to grant tacks for a longer period 'than twenty-seven years, nor to diminish the rental.'

My Lords, with respect to this, some argument has been addressed to your Lordships, whether the words were sufficient to prohibit and resolve with respect to binding the disponees; but I do not think it is necessary to trouble your Lordships upon that. Then follow the irritant clauses, binding on disponees and heirs of entail, not obeying the conditions, or acting contrary to the restrictions and limitations, declaring they are to forfeit all right to the estate, and it is to go over to the next heirs of entail; and then follows this clause—[His Lordship then read the clauses declaring that any diligence done against the estates for the debts of John Vans, &c., after the date of the entail, should be ineffectual; but that if it should be led for debt contracted before its date, he and the other heirs should be bound to redeem. See ante, p. 324.]—Your Lordships will therefore observe, that there is a distinction made as to adjudications, apprisings, and diligence for debts of John Vans and Margaret Agnew, contracted prior to the date of the deed, from those contracted by any other of the heirs and substitutes of tailzie, either before or after their succession to the land and estates.

Then, my Lords, there are clauses that it shall be in the power of any heir of entail to redeem the estate from the adjudications; and that if two heirs are willing to redeem, that the nearer heir shall be preferred; that if the nearer heir shall be abroad, or a minor, or heir born after redemption, he shall be entitled to redeem, upon paying double the sum paid to the creditor; and there is an express clause that John Vans's debts are not to affect the lands of Sheuchan. With respect to exceptions to the restriction, it further provides, first, that the disponees and heirs of entail are entitled to feu certain parts of the estate; and, secondly, to grant liferent infeftments to wives and husbands, and also to wives and husbands of the immediate or next substitute, with certain limitations upon the amount of them; and then there follows a reservation made to John Vans, that, in an event which is referred to, he shall take back again the estate of Barnbarroch, save and except so much of it as would be of the value of £3000 sterling, which had been paid by Robert Agnew to him;—that is, in truth, buy it back again.

Then, my Lords, there are the further conditions—debts contracted, or deeds to be done by the disponees and heirs of entail, not only to be void, but unavailable against the other heirs of entail—the other heirs of entail may obtain declarations of irritancy, and obtain themselves infeft in the entailed estates—contravener to be excluded from management of the estate during the minority of the next heir of entail,—and the remoter heir redeeming not entitled to burden estate with provisions to wife or children. Then there is the usual assignation to the title-deeds of the estates, and a provision, that if John Vans or Margaret Agnew should

July 31. 1822. marry again, they were respectively to be restricted to a free locality of £200 sterling, but the remainder of the fee to go to the heir of the family.

Your Lordships have observed there was a recital that no provision had been made for Margaret Agnew upon the marriage, and there is therefore an obligation by John Vans and her to accept of the disposition in full of every claim upon Robert Agnew, and an obligation by Robert Agnew and John Vans to free lands and heirs of entail from payment of their debts; and then the deed ends with a procuratory for recording the entail, clause of registration, and precept of sasine; and then there is a certificate, of the 18th of January 1758, that the contract was duly recorded in the Register of Tailzies, and states where it is to be found; so that this is an entail, such in its clauses as I have stated, immediately after the execution of it properly recorded.

My Lords, this having been entered into, the printed Cases upon your Lordships' table proceed to state the death of Robert Agnew in 1774, leaving, besides his entailed estate, a fund of about £20,000; that he left no other will or settlement of his affairs except the contract already mentioned; that his fund of £20,000 was lent upon heritable bonds, which, in general, secluded executors, and, failing himself, were made payable nominatim to Robert Vans Agnew, his grandson, the appellant's father, which, it has been contended, ought to have been accounted for in the course of some of the proceedings. I shall have occasion to take notice of this by and by; but I do not trouble your Lordships with that, because the opinion I have formed upon this case does not rest on the due application or non-application, in any degree whatever, of that fund. In the papers laid before me, there is that which is meant to be evidence of the fact that the personal estate had been duly applied. Whether it had or had not, it does not appear to me necessary to trouble your Lordships with any observations arising out of that circumstance.

My Lords, it is represented that Mr. John Vans died in the year 1780. It is represented that he owed considerable debts; that those debts were upon obligations merely personal, and signed John Agnew, the name which he had assumed and constantly used after the execution of the contract of marriage with his wife and her father, containing a sale and mutual entail of his estate; that Robert Vans Agnew, who was his eldest son, made up titles to these estates, as it is here stated, on the 19th October 1781, none of his father's creditors then interfering; and that he was infeft in them for upwards of a year before any steps preparatory to adjudication were taken by John Vans's personal creditors. I ought to mention to your Lordships, that, on the 20th of May in the year 1775, John had obtained a charter proceeding on the contract of sale, marriage, and entail, and in it, and the sasine following thereon, which from that time became the titles by which he held both estates, the whole prohibitory and other clauses contained in the contract with his wife and father-in-law were inserted.

My Lords, I pass over the circumstances which intervened; but it appears that very soon Robert Vans Agnew and the creditors of Robert Vans Agnew proposed to prove the debts of John Vans upon

this estate; and it becomes here necessary to mention to your Lord- July 31. 1822.
ships, as a justification of those doubts which have been thought to be very extraordinary, that, upon the 21st of October 1780, a gentleman now living, of very great ability,—I mean Sir Ilay Campbell, who was President of the Court of Session,—gave an opinion on a memorial laid before him for Robert Vans Agnew, and in which he says, 'I have con-'sidered this memorial, from which it appears that the memorialist's 'grandfather and father executed mutual entails of their estates, which 'were completed in terms of law, and recorded in the Register of Tail-'zies. I apprehend it to be clear that this was an onerous transaction, 'which neither party could afterwards defeat, except by mutual consent. 'By the clauses of limitation recited in the memorial, I apprehend that 'the memorialist's father,' that is, John, 'was tied up from contracting 'debts to affect either the estate of Sheuchan or his own original estate 'of Barnbarroch, as the clauses expressly relate to him as well as to the 'heirs after, and are prohibitory, irritant, and resolutive. Such debts, 'therefore, as he has contracted posterior to the executing and recording 'of the settlement will not affect the estate, though, as to prior debts, if 'there be any, I think they will affect the lands of Barnbarroch; but I 'presume all these were paid off by the £3000 which was then advanced 'to him by his father-in-law.'

My Lords, it has likewise been stated that this deed was in fact settled under the inspection of Lord Braxfield. I do not think we have sufficient evidence of that fact; and therefore I do not rely upon that as giving authority to the document. My Lords, it appears also that the creditors presented a memorial to Messrs. Maclaurin and Crosbie, and your Lordships have upon your table their opinion, dated the 22d of August 1781. Upon that memorial for the creditors of John Vans, those two gentlemen, Mr. Maclaurin and Mr. Crosbie, being persons of great eminence, as I have always understood, gave their opinion in these words:—'We have considered the memorial for the cre-'ditors of the late John Vans of Barnbarroch, and the deed of entail 'and contract of marriage therein referred to, (viz. old Mr. Agnew's 'contract of marriage with Margaret M'Dowall,) and we are of opinion 'that the deed of entail is not defective in any solemnity, or labours 'under any nullity, but is very carefully and properly drawn. We 'think the entail would be considered as an onerous deed for several 'reasons, and especially because Robert Agnew of Sheuchan was 'under no obligation, by his contract of marriage, to give his estate 'to his daughter Margaret. By the contract, in the case of there 'being only one daughter, he was bound to pay her the sum of £500 'sterling, but laid under no obligation to give her the estate. That 'is provided to the heirs-male of the marriage; which failing, to the 'heirs-male of his body to be procreated of any other marriage; which 'failing, to his own nearest heirs or assignees whatsoever. He could 'not disappoint the heir-male of the marriage gratuitously, but there 'was nothing to hinder him to execute what deeds he thought pro-

July 31. 1822. 'per, to the prejudice of his heirs whatsoever, under which character 'only his daughter Margaret could claim his estate: But whether the 'entail was onerous or gratuitous does not appear to us to be material; 'for there was nothing to hinder Mr. Vans to convert the fee-simple that 'was in him into a tailzied fee, and that was done by the entail in ques- 'tion. After infeftment was taken upon that entail, and recorded, and 'the tailzie itself recorded in the Register of Tailzies, no debt contracted 'by Mr. Vans could be effectual against the estate; but all debts con- 'tracted before execution of the entail, and not only these, but all con- 'tracted before registration in both registers, (for the law requires two 'publications,) will be effectual. A process of reduction, calling all the 'heirs of entail in existence at the time, is no doubt the most complete 'and formal method of challenging the entail. At the same time, as the 'present heir of entail' (that was Robert) 'is disposed to give no unne- 'cessary trouble,'—which appears to me to be using those words in the mildest sense in which they can be used,—'as the present heir of entail 'is disposed to give no unnecessary trouble, we should think it might do 'for him to appear and oppose an adjudication, and a reduction might be 'repeated. But if the calling of the heirs of entail will not be attended 'with much delay and expense, it would be best to insist in a formal re- 'duction.'

Mr. Maclaurin gave another opinion on the 27th September 1781; and I will take the liberty again to say, that I think myself a little excusable if I doubt whether a man could not tailzie an estate to himself, when I find men of such authority as Campbell, Maclaurin, and Crosbie, of that opinion. He says, 'I have again considered the memorial and queries 'for the creditors of the late John Vans, with the additional memorial and 'different letters and papers therein referred to; as also the decisions in 'the cases Street and Jackson against Manson, Pot against Pollock and 'Reid of Daldilling, which were suggested by Mr. Bell, (the agent for 'the creditors,) in support of the challenge of the entail, on the ground of 'its being reducible as a fraudulent deed between a father and son to 'ensnare creditors. These decisions are collected by Lord Stair, and 'are abridged in the Dictionary, under the word Fraud. I have per- 'used them; but the present case does not appear to me to come up 'to them. In these cases, a disposition granted by a father to his son 'was reduced at the instance of creditors whose debts were contracted 'by the father posterior to the recording of the infeftment of the son on 'the father's disposition, but then there was a clear proof brought of this 'being a fraudulent contrivance to disappoint creditors, and there were 'many circumstances that afforded of themselves the most direct evi- 'dence of a gross fraud. And, in the first case, that of Street, the father, 'the granter of the disposition, was declared infamous by the Court on 'account of the fraud. The words of the interlocutor, as reported by 'Stair, are, 'Found that the disposition by the father to his son was "done by a merchant, who carried on a public trade and correspondence, "and could have no rational intent but to deceive the pursuers, being

" strangers, and his correspondents, the son being an infant, and no oblige- July 31. 1822.
" ment on the father to infeft him," &c. (Then a variety of other circumstances are mentioned.) 'Therefore the Lords reduced the disposition, and declared Manson, the father, infamous for so great a fraud.' 'In the next case of Reid, the son also was an infant, and a variety of circumstances were mentioned in the interlocutor. These decisions appear 'to me to be just, and no doubt establish that the mere recording of an infeftment of a son upon a disposition from his father will not exclude the 'subsequent contractions of the father, if it appear that the father disponed 'to the son merely for the purpose of ensnaring and defrauding creditors. 'And these decisions would apply to the case in hand, if circumstances 'were condescended upon that proved the entail to have been entered 'into for such purpose. If, for example, it had appeared that old Mr. 'Vans, after beginning his house, and entering into a trade and correspondence, to use the words of the above-mentioned interlocutor, with 'masons, wrights, and the like, had denuded in favour of his son, or 'made an entail such as that in question, I think the tradesmen who continued to furnish to him after the deed would have had good reason to insist that it should not prejudge their debts of posterior date to it, and to 'have set it aside upon the ground adopted on the above decisions; but 'then no such circumstances are condescended on in the present case; 'and particularly the house, I understand, was not begun to be built till 'several years after the last registration. And the deed in question 'seems to be rational and onerous for the reasons mentioned in the 'answers to the former memorial; at the same time, it is true that all 'such deeds are a snare to trading people, and to country people. Banks, 'bankers, and money-lenders, have a list of all the entails, which they 'consult before lending any sum; but country people, and even shopkeepers in towns, are, and frequently must be, taken in, from their either 'not knowing of, or not adverting to, the records. This may be an argument for abolishing entails altogether, or for having infeftments notified to the country in some other method that will more generally spread 'abroad than registration does. But, as the law stands, registration in the 'proper registers does certainly preclude subsequent contractions, unless 'where there is a proof of a fraudulent intention and concert, as in the 'cases above mentioned; and therefore I must still think that there is 'no ground upon which the debts contracted subsequent to May 1775,' (that is, the time when the infeftment was taken,) 'can be effectual against 'the estate. The advising a reduction at the instance of some of the 'creditors of each class, did not imply that it was thought posterior creditors would have a chance of prevailing. It was only mentioned in 'case these creditors should choose to try the question, notwithstanding 'the opinion, which, from one of the letters referred to, it seems probable 'they will do, and they certainly are by no means to blame for doing 'their utmost, but it is to be feared they will not succeed, unless upon 'the head of fraud; and in order to make it good on that ground, they 'must say more than is stated in the memorial.'

July 31. 1822. My Lords, Mr. Crosbie's opinion was taken a second time, and he gave an opinion to the same effect.

I have mentioned these opinions to your Lordships, because they appear to me, together with the fact of a contract of tailzie of this sort, being executed so long ago as the date of this contract, to imply that it was not at all understood at that time by conveyancers, and considerable lawyers, that a man could not (putting fraud out of the case) make a tailzie with irritant, resolutive, and prohibitory clauses, that would bind himself, if the transaction was an honest transaction; and if your Lordships refer to the judgment from which this is an appeal, you will find it to proceed upon an idea, that certainly had not got into the heads of any of the lawyers whose opinions I have stated, nor could, I think, have been in the mind of that conveyancer, whoever he was, who drew this mutual deed of tailzie, that it could not be done if it was fairly done, and for considerations that made it onerous. However, my Lords, afterwards the creditors adopted proceedings, with the assistance, as it seems to me, of Mr. Robert Vans Agnew,—I am afraid I should be justified in saying, he colluding, and, as the papers represent, having a very considerable interest himself, in making this entail subject to debts. John Vans Agnew had contracted debts, which, at the time of his death in June 1780, amounted to £11,000 and upwards, and had also granted bonds of provision to his younger children, which at his death amounted to £3000 and a fraction, besides interest and penalties, and two persons of the name of Stewart and Drew, as trustees for the creditors, thereupon led adjudications, and brought an action of reduction and declarator against Robert Vans Agnew and the other heirs of entail then in life, concluding that the entail should be reduced as far as related to the estate of Barnbarroch, and that they should be entitled to pursue all legal diligence against that estate, notwithstanding the entail. The case came before the Court on the 3d March 1784; and there is, first, my Lord Braxfield's opinion. He says, 'No fraud 'here; the entail must subsist, but not to affect creditors; all debts con-'tracted before recording of infeftment must be good; this is provided 'by the statute of 1685; and this is agreeable to the principles of the 'feudal law of Scotland. A personal deed of entail will not qualify a 'right in a person by charter and sasine.' Here your Lordships see you have the great authority of Lord Braxfield, expressly stating that all debts contracted before recording infeftment must be good. Then he goes on to state himself thus, not in the positive language in which he had stated that proposition, that all debts contracted before recording infeftment must be good, but he says, 'I incline to go further. Prior to the statute 'of 1685 entails were in use, but doubted how far, by the common law, 'a proprietor could lay such extraordinary burdens. The statute of '1685 interposed to prevent such questions. It lays burdens upon heirs 'of tailzie, but nothing in the statute which says that a man may bind up 'his own hands, possess the estate, and yet secure it from creditors; that 'is contrary to the nature of property, and it would have been unlaw-'ful in the Legislature to do so. No one could make up a title on the

'estate in case of the contravention of Mr. Agnew, the maker of the en- July 31. 1822.
'tail; it is a different case where the maker of the entail puts the fee in
'the heir, and reserves only a liferent; no difference that here a mutual
'entail; that good as to the person contracting with him, but still the
'debts will be good quoad the creditors—this was determined in the case
'of Barholm,' a case which your Lordships will recollect is very largely commented upon in these papers. My Lords, I think I may venture to say, from respect to the memory of Lord Braxfield, that it is impossible for him to have said that this was contrary to the nature of property, and that it would have been unlawful for the Legislature to do so. Improper it might have been, but not unlawful. Then he puts a case, which, if it be law, (which I apprehend it is,) certainly shows there is a means of doing all the mischiefs which are imputed to this entail. He says, 'It is a different thing where the maker of the entail puts the fee in
'the heir, and reserves only a liferent, and that in that case the entail
'will be good in the heir, and he will only have a liferent.' Taking this to be the law, it is quite obvious that there is a way of so settling, as that the entailer shall only have the liferent, and the heir shall have the fee; the effect of that would be, that all those consequences, which are supposed to be so mischievous as to put men on another mode of entailing, may be consequent on the mode of entailing Lord Braxfield points out; but with respect to what he says, when he uses the words, 'I in-
'cline to go further,'—he does not go to the length of saying that he *does* go further. He says, 'Prior to the statute of 1685 entails were in use;' (it is very extraordinary that in some of these papers we should have the assertion that entails were not known in 1685); he says, 'but doubted
'how far, by the common law, a proprietor could lay such extraordinary
'burdens. The statute of 1685 interposed to prevent such questions. It
'lays burdens on heirs of tailzie.' And here your Lordships will permit me to put you in mind how many cases we have had here, in which it has been determined that an institute is not an heir of tailzie; how many cases we have had here, in which it has been determined here, on the authority of the Court of Session in Scotland, that though an institute is not an heir of tailzie, and though he is never mentioned in the act of 1685, if he be nominatim fettered, the fetters upon the institute are just as good as the fetters upon the heirs of tailzie.

My Lord Monboddo says, 'I have no doubt as to the validity of all
'the debts prior to the recording of the entail by infeftment; nor have I
'any doubts even as to posterior contractions, for the limitations of the
'entail are only against the heirs of entail.' If by that his Lordship meant that the limitations, however expressed, can only be considered as limitations against the heirs of entail, then I understand him; but the limitations of the contract, if you are to determine from the expressions in the contract, are express against the institute, that is, the maker of the entail, as well as against the heirs of entail. 'No man can possess an estate
'without being liable to debts contracted by him, unless there be a pro-
'vision irritating the right.' No matter that here a mutual entail, that is

July 31. 1822. 'merely a personal contract; however onerous, it will not affect creditors 'who contract on the faith of the records.' Now, my Lords, if this is an onerous contract, and if this onerous contract is itself upon the records; if it be duly registered and recorded; and if infeftment has been duly taken upon it, then the lieges had just as good notice of this onerous contract so recorded, and of the steps which were taken, as they had of any other contract which is upon the record.

Then the Lord Justice-Clerk says, 'I cannot perceive the principle 'which distinguishes mutual entails from simple entails. An onerous 'consideration for making the entail will not alter the nature of the right; 'that may be a good obligation at common law to make the entail good, 'but will not affect creditors. All that they had to do was to look to 'Mr. Vans's titles, which contain no prohibition or irritancy,' not regarding as binding upon him the prohibitions and the irritancies I have read to your Lordships. There is certainly a difference between an entail being good at common law, as affecting the persons to take under it, and as affecting or not affecting creditors: that, I apprehend, will depend upon the circumstances under which it is taken. They then find, 'that the 'entail subsists, but that it cannot affect the just and lawful creditors of 'Mr. Vans, and that the estate of Barnbarroch is subject to, and affectable by, the debts due by the said John Vans at the time of his death.' Your Lordships observe, that the debts described here are the debts, not which were due at the time the contract was entered into,—not which were due at the time the contract was recorded,—not which were due at the time the infeftment was taken,—but the debts which were due at the time of his death; it does, therefore, include every debt at the time the contract was entered into, and between that period and the time of his death.

My Lords, this judgment having been passed, Mr. Agnew of Sheuchan then brought an action of reduction and declarator before the Court against the heirs of entail of the said estates, concluding that the entail should be rescinded and annulled, or at least that the said Robert Vans Agnew should be entitled to sell so much of the estate of Barnbarroch as would be sufficient to pay the whole debts of the said John Vans, and praying for a decree of the Court to sell so much of the estate of Barnbarroch as would be sufficient to pay off those debts. This seems to have been one of the projects which Mr. Robert Agnew of Sheuchan had entered into for getting rid of this entail, it being probably more for his interest, he being a creditor, than as being entitled under the entail. The Court, however, upon the 11th of March 1785, 'repelled the reasons of 'reduction, and in regard there was no clause or provision in the entail, 'by which the heir of entail was empowered to sell the whole or any 'part of the estate for payment of debt, and that the Court had no jurisdiction to authorize any such sale, dismissed the action.'

That judgment of dismissal led afterwards to the passing of this private act of Parliament which I now have in my hand; but it becomes material to mention to your Lordships, that at a period very distant from the date

of the interlocutors, the substance of which I have last stated, an appeal was brought to this House by the present Mr. Agnew, I think; and when that appeal came to this House, your Lordships were pleased, in the year 1814, to remit the cause back to the Court of Session to review those interlocutors. I observe in the papers, intimations are made that there was considerable doubt what were the reasons that led this House to remit this case for review. I think your Lordships will be fully justified in having so done, when you had seen the opinion of such men as those whose opinions I have read, and when your Lordships had seen what were the propositions that I have just stated from the notes of the Judges: when it is recollected that that passed in the year 1784 or 1785, and when your Lordships were not in possession of the doctrines which the Court of Session had laid down in subsequent cases, either confirmatory of the decision of 1784, or departing from that decision of 1784, I think it will be seen that that was not an unwholesome mode of proceeding, and the most respectful to the Court of Session to desire that they would reconsider that interlocutor. They did accordingly do so. They appear to have adhered to it, and from that interlocutor of adherence the first appeal is brought to your Lordships. July 31. 1822.

In the mean time, my Lords, an act of Parliament passed, which, after stating all the circumstances I have stated to your Lordships, stated these several circumstances:—'Whereas the debts of the said John Vans Agnew 'having been thus decreed to be effectual against the said estate of Barn-'barroch, notwithstanding the said entail, and the rents of both the en-'tailed estates being insufficient for the purposes of paying and keeping 'down the interest on the said debts, affording a suitable maintenance to 'the said Robert Agnew and his numerous family, and discharging or 'paying the principal sum of these debts within the time limited by the 'entail, the present net yearly rent of the said estate of Barnbarroch 'being £913: 16: 8 sterling, or thereabouts, and the present net yearly 'rent of the said estate of Sheuchan being £920: 2: 8 5-12ths sterling, 'or thereabouts, and the debts amounting to £14,100 sterling and up-'wards of principal money, besides interest.' It will be in your Lordships' recollection, that in the papers upon the table it is stated that sales were made for the purpose of assisting Robert in the obligation that he would have been under to keep down the interest of the debt upon the estate at his father's death.

Then the preamble proceeds to state, 'That sundry of the creditors, 'whose debts amount to £6400 and upwards, have instituted an action 'of adjudication of the estate of Barnbarroch before the Court of Session, 'for payment thereof, and the other creditors are also about to insti-'tute similar actions, for payment of the principal monies and interest 'owing to them, and penalties incurred, and for accumulating the whole 'into one principal sum, whereby the said estate of Barnbarroch may be 'absolutely and irredeemably carried off from the said Robert Agnew, 'and the other heirs of entail, and the said estate of Sheuchan may be 'forfeited by and carried off from the said Robert Agnew, pursuant to

July 31. 1822. 'the forfeiture or irritancy imposed in and by the said entail, unless the 'same should be prevented by a sale of a part or parts of the said en- 'tailed estates, sufficient to pay off and discharge the debts of the said 'John Vans Agnew affecting the said estate.' Your Lordships will observe, Robert Vans Agnew's debts did not affect the estate of Barnberoch, but the estate of Sheuchan. Then it says, 'That it is for the be- 'nefit and advantage of all the heirs of entail interested therein, that a 'competent part of the said entailed estates shall be sold for paying off 'the said debts so affecting the same as aforesaid, and they are willing 'and desirous that such sale shall be made.' Then it has a reference, in the next clause, to the clause to be found in the contract, as to the repurchasing, as far as the £3000 would purchase. Then this is the enactment —[His Lordship then read the enacting clause, see ante, p. 333.]—Then it enacts that the purchasers shall have good and effectual titles, in the same manner as they have at judicial sales, and that their acquittances shall be acquittances to the purchaser; there is the usual clause about laying out the surplus in the purchase of lands to be settled to the same uses, and there is a clause which provides as to the purchase of the £3000, to be made in a certain event that might take place, and the saving is 'other than and except the said Robert Agnew, and the heirs of entail 'entitled to succeed to the said entailed estate, by virtue of that deed of 'entail, all such right, title, interest, claim, and demand of, in, to, or out 'of all or any of the lands and estates aforesaid, or the monies to accrue 'by sale thereof, as they severally have or might have claim, challenge, 'or demand, in case this act had never been made.'

My Lords, the appellant then brought his action in the Court of Session, insisting that the sales which have been made under this private act of Parliament were sales which could not be deemed valid and effectual, and upon this ground that they were not made according to the powers and authorities given by the act of Parliament; and the Court of Session having been of opinion that action could not be maintained, for that the proceedings which had been had in the Court of Session were proceedings that gave effectual titles to the purchasers; the two questions your Lordships have to decide therefore are, Whether the opinion of the Court of Session, upon the remit of the interlocutor pronounced in 1784, is right? and, Whether the interlocutor of the Court of Session, with respect to those sales, is also right?

Now, my Lords, with respect to the first of these questions, it would be a waste of time for me to state to your Lordships all the contents of the papers upon the table. The principal objection the Court of Session have taken to the entail, as not being effectual against the creditors, such as were creditors at the death of John Vans Agnew, is, as the papers state, an objection founded on this sort of principle and reasoning,—that a man cannot fetter his estate as against himself; that the act of 1685 enables him to fetter his estate by resolutive, prohibitory, and irritant clauses, as against heirs of tailzie, but that he cannot do it against himself. My Lords, when we come to look at the reasoning why he cannot do it

against himself, it is said that that statute enables him to do it as against heirs of tailzie, but that it only enables him to do it as against heirs of tailzie; to which it was answered, it is true that statute was made to remove doubts, and to enable good and valid entails against heirs of tailzie; but still that statute could not alter what the law was with relation to provisions, as to others than the heirs of tailzie; and it has been repeatedly observed in this House, in the case of Duntreath and a variety of other cases, with which all your Lordships must be familiar, that an institute, for instance, is not an heir of tailzie; that the description of an institute is no where to be found in the act of 1685; and yet you have very few questions whether the institutes are not bound, if you only bind the heirs of tailzie. The description frequently is, John such-a-one and the other heirs of tailzie, where John such-a-one was an institute. It is said that you cannot imply from those words that he was as an heir of tailzie meant to be fettered, because he is not an heir of tailzie. In the case of Duntreath, it will be in your Lordships' recollection, that expressions of that kind are to be found in various places; 'the institute,' naming him, 'and 'the other heirs of tailzie;' but when you come to look at the resolutive, irritant, and prohibitory clauses, they are only on the heirs of tailzie, and though that man was called one of the heirs of tailzie, by the reference to the others as 'the other heirs of tailzie;' and though it is said you cannot by implication fetter the man, but that he must be expressly named, yet if you find, as you have done over and over again, that if the institute is expressly named, he is as much bound as the heirs of tailzie, there does not appear to me to be, in that case, any difference between the institute and the succeeding heirs of tailzie. If your Lordships will look to what is to be found in Stair, in Hope, and in Mackenzie, it appears to me that the maker of the entail himself may be bound; it is said he clearly may be, if the deed of tailzie is an onerous deed. It is very true, that, after these cases, your Lordships will not hastily decide, that if the deed was not an onerous deed he could bind himself, but if it be an onerous deed, made on sufficient consideration, notwithstanding all the reasoning I have seen, it does appear to me to be quite sufficient to support the obligations entered into. I say, such a deed will bind him if he sells the estate for money, and money constitutes the consideration. What is this, in truth, if you come to analyze it, but a sale according to the expression to be found in it? What is it but a sale made by John Vans to Robert Agnew for the consideration there mentioned? If they had thought proper to make a conveyance in another way; that is to say, if they had conveyed to Robert Agnew, for the consideration there mentioned, Robert Agnew might immediately by deed have created an entail, restricting most absolutely John Vans, as well as all other takers; and the question is, whether this is not in effect the same thing, considering the nature of the contract, and the other obligation which arises out of the consideration?

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My Lords, I will only refer generally to the arguments on this subject. I could read all this book which I hold in my hand on the subject to your Lordships; but I do confess, after considering the arguments which

July 31. 1822. have been addressed to us from the Bar, and on looking into writers, and reading these papers, I have a very strong conviction that, independently of that statute of 1685, such a deed as this,—recollect, my Lords, I do not say a gratuitous deed,—but such a deed as this, proceeding on onerous consideration, and valuable consideration, not a mere mutual entail, but proceeding likewise on money considerations, is competent to bind him; that is to say, that he contracted a personal obligation to make this effectual, and that he did make it effectual by infeftment; and though it appears to me the debts contracted, at the time the contracts were entered into, were personal obligations, yet if adjudications were led upon those debts before the infeftment was taken, it appears to me they would be prior rights; but it does appear to me that adjudication led after infeftment was taken would not be effectual as prior rights,—and that accords with the declaration of Lord Braxfield, to which I have drawn your Lordships' attention. I should therefore propose, with your Lordships' permission, to alter this interlocutor in the manner I will presently mention to your Lordships.

My Lords, the other part of the case is an extremely distressing part of the case—I mean that respecting the purchasers; and I wish to lay it down in language as clear as any in which I can express myself, that if a Court in this part of the island, or in Scotland, is authorized by an act of Parliament to proceed to a sale in the manner in which the act of Parliament provides they shall proceed to a sale, no purchaser is answerable, or can be answerable, for the mistakes or blunders of the Court. Parliament trusts to the wisdom and discretion of the Court; and if the Court acts according to the rule of proceeding which is laid down for its proceedings, although they may be wrong;—for instance, if they were to mistake the amount of the debts—if they were to suppose that debt A. affected lands when it did not affect lands, or that debt B. did not affect the lands when it did affect the lands,—and if purchasers under those mistakes and blunders were not found to be safe, I do not know how any one could deal as a purchaser under an act of Parliament. But then, I conceive that every Court is bound to proceed according to the directions of the act; and that, if the Court of Chancery was bound to proceed according to the prescribed mode, and did not so proceed, then the transactions of the Court of Chancery would be no more a security to the purchaser than the transactions of the Court of Session would have been, if they had not been authorized by law to proceed; and so vice versa, if the Court of Session has not proceeded as the act of Parliament directs, the consequence of that is, that the purchaser under that Court is in no better situation than the purchaser under any other Court, not conforming to the proper course of proceeding.

Then, my Lords, what are the circumstances? The Court of Session should, in the first instance, have ascertained what were the debts—the whole amount of the debts affecting these estates; and they should have ascertained not only what was the whole amount of the debts affecting these estates, but they should have gone quite a different way to work

from that they have pursued, in the case of the judgment creditors of Robert Agnew. They should have called all the heirs; and in case of these being infants, they should have brought before the Court the persons representing them, and in the presence of all, have ascertained the whole extent and amount of the debts,—themselves judging which were to be considered as affecting the estates, before they proceeded to any sale of the property. Now, I cannot believe that the infant children of Robert Vans Agnew were at all represented in the Court below. I think it is clear they were not. It is very true, Lord Braxfield had been appointed tutor ad litem in the suit in 1784; but there is no evidence that they were brought before the Court at all in this suit. The whole proceedings, therefore, appear to me contrary to the powers and authorities given to the Court of Session, in order to make good titles to the purchasers. July 31. 1822.

My Lords, there are some other objections, namely, an objection that the interest entered into the computation of debts effectual against this estate. It is very true, as has been stated, that Robert Agnew ought himself to have kept that down. I do not, however, enter into that question: I am not quite sure that they have not made a mistake as to what debts meant in the act of Parliament. If the objection were merely that the Court had mistaken in having sold part of the estate of Sheuchan before all the Barnbarroch estate, upon such a ground as that I should be very unwilling to disturb the sales. Your Lordships know it is a very ordinary thing in the Court of Chancery in England to order an account of the personal estate to be taken, and then, if that is not sufficient, that the Master shall proceed to a sale of real estates; but where it is clear that the application of the personal estate will not be sufficient for the payment of the debts, then the Court has, in some instances, anticipated the sale of real estate, and though not strictly within the meaning of the decree, that is not interfered with.

My Lords, I will not allude to cases in which actually existing entails, framed under the direction of the Court of Session, and intending to bind the party himself, are in the terms of that on which this question turns. My noble friend has, I know, such before him; but, without stating more, the result of the opinion I entertain upon this subject is this—that it will be right, in the first case, to reverse so much of the interlocutor of the 3d of March 1784 as found generally that the estate of Barnbarroch was still affectable by the debts due by John Vans of Barnbarroch at the time of his death; and to find that such estate was affectable only by the debts of the said John Vans which were due at the time of the date of the deed of tailzie of the 29th day of December 1757, and which remained due at the time of his death; and such other debts of the said John Vans (if any) as had become real charges upon the said estate before the infeftment of the 16th of May 1775; and to refer the cause back to the Court of Session, to do therein as may be consistent with this finding, and as shall be just.

In the second cause, I would humbly move your Lordships to reverse the several interlocutors complained of, and to declare that the appellant, and the other children of Robert Vans Agnew, who were named as de-

July 31. 1822. fenders in the action of declarator and sale in which such interlocutors were pronounced, appearing on the face of the proceedings to have been minors at the several times of pronouncing such interlocutors respectively, and not to have been properly brought before the Court as defenders in such action, according to the provisions of the act of Parliament in the said action mentioned, the Court had no authority to pronounce any interlocutor in such action affecting their interests, and especially had no authority to proceed to a sale of any of the lands of Barnbarroch or Sheuchan in the said act mentioned; and therefore, that all the proceedings of the said Court in the said action of declarator and sale, so far as the same affected the interests of such minors in the said estates respectively, under the deed of entail in the said act, and in the said proceedings mentioned, were proceedings without the authority for that purpose required by the provisions in the said act of Parliament, and were therefore null and void as against the appellant, and the several other minor heirs of entail; and particularly, that the sales made by the said Court, in pursuance of the several interlocutors pronounced by the said Court in such action of declarator and sale, were null and void as against the appellant and the said several other minor heirs of entail; and that the appellant, on behalf of himself and the said several other minor heirs of entail, is entitled to have the sales made under the several interlocutors aforesaid reduced, and to have the lands restored to him, along with the rents from the period of his accession to the entailed estates, subject to such proceedings as may be had in an action to be instituted in the said Court, under the authority of the said act, for the purpose of inquiring into and ascertaining the extent and amount of the debts owing by the said John Vans Agnew at the time of his death, chargeable upon or effectual against the said entailed estates, or any of them, to the end that the said Court, after having fixed and ascertained the extent of such debts by interlocutors or judgments in that behalf, may proceed to sale of such parts of the said estates respectively as may be necessary, in such order, manner, and form, as directed by the said act; and that the cause be remitted back to the Court of Session to execute this judgment, and further to proceed as shall be consistent with this judgment, and shall be just.

Your Lordships observe, that this applies on the general principle to all the purchasers. It is unnecessary to enter into the distinctions to be found in the different cases, or to state the grounds upon which, I think, one may venture to say, that, attending to all which passed, the same principle must govern all;—it would be one of the most difficult things in the world to distinguish between the one and the other.

Lord Redesdale.—My Lords, the great importance of this cause will, I trust, be a sufficient excuse for my troubling your Lordships shortly upon it. With respect to the doubts which have been suggested, whether, attending to the nature of this entail, it could be binding upon the institute, it appears to me very extraordinary that that matter should be at all in question, because, my Lords, previous to the act of 1685, en-

tails had subsisted, which entails were, I believe, exactly of this description. The act of 1685 says nothing with respect to the institute; and I should infer, from the statute of 1685 being perfectly silent upon that subject, that it was a recognition of the binding effect of an entail of that description, prior to that statute, on persons, the immediate object of the deed creating the entail, and that the doubt was with respect to the remoter heirs of tailzie; as it seems to me that has been considered by your Lordships as really the doubt on which the statute of 1685 passed; and it is a most absurd thing to suppose that in 1685 the Legislature should confine its attention to the remotest heirs of tailzie, and leave the question open as to those who were the more immediate objects of the conveyance. July 31. 1822.

My Lords, if I had any doubt upon this subject, after having heard it argued so fully as it has been at your Lordships' Bar, I might refer to settlements very recently made, under the authority of the Court of Session, in execution of acts of Parliament, which acts of Parliament had given power to settle estates in lieu of estates given in tail. The usual form and manner in which that is done, is by leaving the Court of Session to direct an entail to be made, which shall be effectual with respect to the estate to be settled, instead of the estate which was previously settled; and if that which I have heard upon the subject of this case is correct, and if the decision which is now in review before your Lordships, in the case of a particular entail, is the law of Scotland, then the Court of Session in Scotland must have been guilty of very gross negligence in what they have done in the execution of the acts of Parliament such as I have described.

My Lords, I have in my hand two settlements very recently made, one in December 1816, the other in January 1817, of property of this description. The first is a settlement made by the Duke of Atholl. The Duke of Atholl being in possession, under an entail executed by his father, by which the property of Tullibardine and other estates were conveyed to the late Duchess of Atholl, and the heirs whatsoever of her body, with a variety of substitutions running through a great number of persons of the family of Murray, and having also estates called Wester Kinnaird, and other estates which lie extremely convenient for the purpose of the enjoyment of the principal estates which he had under this entail, and the estate of Tullibardine not being of that description, he proposed to make an exchange of the estates of Wester Kinnaird for this estate of Tullibardine, and in the deed executed for the purpose, under the authority of the Court of Session, only on the 4th of December 1816, recited the settlement which had been made by the late Duke of Atholl, in the time of the present Duke, under which settlement he held the estate of Tullibardine, and reciting that the Duke stood heritably infeft and seised, as of fee-simple, in the lands and estates of Wester Kinnaird, and other lands particularly described, and stated, that it would be more convenient and advantageous for him, and the subsequent heirs entitled to succeed to and to take the estates which were entailed by the late Duke of

July 31. 1822. Atholl, his father, to settle this estate instead of that of Tullibardine; and the act of Parliament reciting all this, it was enacted, that from and immediately after the passing of the act, the Duke of Atholl, at any time during his life, or, failing him, the heir of entail for the time being possessed of the estates comprised in the deed of entail therein before recited and referred to, made by the late Duke of Atholl, and also of the lands and estates of Wester Kinnaird, and the other lands particularly mentioned in the first schedule annexed to the act, should be at liberty to apply by summary petition to the Court of Session in Scotland, in either of the Divisions thereof, and by and with the directions and approbation of the Court to make, grant, and execute a disposition, or deed of settlement, or entail of the lands and heritages comprised in the said first schedule, as the same were contained and described in the title-deeds of the Duke of Atholl, or his predecessors or authors, and that in the manner or form which should appear to the Judges of the Court most proper for effectually settling and securing the lands and heritages, freed of and discharged from all debts and incumbrances affecting, or which should, could, or might affect the same, to and in favour of the Duke of Atholl, and the other heirs of entail entitled to take and to succeed under and by virtue of the deed of entail made by his father, in the way of strict entail, under all the provisions, conditions, declarations, and so on, provided for the heirs in that entail; which settlement and entail should be so framed as to bind the Duke of Atholl, or the person executing the same, as well as all the succeeding heirs of entail. Then it states a summary application to the Court of Session, and that, in pursuance of the directions of the Court, he had given, granted, and disponed, 'as I do hereby, with and under the reservations,' and so on, 'to and in favour of myself, and the heirs whatsoever of my body, whom failing, to the other heirs.' Now, my Lords, this is an entail which appears to me to be precisely in terms of the entail of the estate of Barnbarroch, and it is exactly in the same words, except that in the entail of Barnbarroch there is the additional word 'sell,' and the transaction with respect to the estate of Barnbarroch appears to be as clearly a sale as it was possible for a consideration taken; the consideration was the sum of £3000, and the settlement by Mr. Agnew of Sheuchan of his whole estate, of which he had the absolute disposing power.

My Lords, the other instance I would beg to mention is one of the 27th of January 1817, another settlement, made under a similar act of Parliament, by Mr. Kennedy of Dunure, by which he settled property of which he was seised in fee-simple in lieu of estates which were entailed by a prior entail. He settles this estate exactly in the same manner, under the authority of an act of Parliament, conceived in nearly the same terms as the act of Parliament respecting the Duke of Atholl. By this deed, he gives, grants, and dispones the estate to and in favour of himself and the heirs-male procreated or to be procreated of his body, and their descendants, whom failing, to the other heirs of tailzie.

Now, my Lords, these two instruments are instruments which the Court of Session have declared to be effectual entails against the creditors

of the Duke of Atholl, and against the creditors of Mr. Kennedy. How that can be consistent with the decision that the entail executed by Mr. Vans of the estate of Barnbarroch, in the manner in which it was executed, and for the considerations for which it was executed, was not an effectual instrument for the purposes intended by that deed—effectual against the debts of Mr. Vans, so far as the deed itself could make it effectual—I cannot conceive. The deed itself provides that the debts which he *then* owed the settlement should not affect, so that the deed was so far an honest deed; that it was intended that all the debts he then owed should be a charge against the estate; but it provided, by the usual clauses for that purpose, that debts *subsequently* contracted by him should not affect the estate. July 31. 1822.

My Lords, upon this settlement, that was so made, immediate infeftment was not given, nor was it taken till after the death of Mr. Agnew of Sheuchan; but, in the year 1775, I think, infeftment was taken upon that settlement, and then, as I conceive, the settlement was completed; and debts contracted after that infeftment could as little affect the estate of Barnbarroch as any debts contracted by the Duke of Atholl after the settlement made by him in the year 1816, or any debts contracted by Mr. Kennedy after the deed of 1817, would have been effectual; and the Court of Session have declared that those two instruments are effectual for the purposes required of them. It appears to me, therefore, my Lords, that they are expressly decisions, if I may so term them, of the Court of Session, in opposition to the interlocutors in the case now before your Lordships for decision. I shall say no more upon that part of the case, perfectly concurring in what has fallen from the noble Lord who has just addressed you.

With respect to the other part of the case—namely, the second appeal, affecting the purchased estates,—it appears to me most clear, that the Court of Session, having no authority whatsoever to decree a sale of the estate, except that which the act of Parliament gave them, they must proceed according to the powers given them by that act of Parliament, and that, if they do not, they are acting without authority. I do not mean, my Lords, to speak of any error in judgment. If they had decided what were the debts with which the estates were affected, and they had improperly so decided—if they had allowed claims that were not within the intent of the act of Parliament, I do not conceive that an error in judgment of that description would have affected the title of the purchasers. But, my Lords, they proceeded without any authority whatsoever. I conceive the Court of Session, in decreeing these sales, had no more authority than I have for the purpose; for the act of Parliament required that a suit should be instituted, to which all the heirs of entail were to be called, and to be made defenders to that suit. In the proceedings instituted for the purpose, the minor heirs of entail, the children of Mr. Robert Vans Agnew, were named in the proceedings, but they were not called before the Court: the proceedings were against them wholly in absence; and, according to all the authorities in the law of Scotland, a

July 31. 1822. proceeding against minors in absence is wholly void; and therefore I apprehend that the whole of the proceedings of the Court of Session in Scotland, with respect to the sale of this estate, were null and void.

I observe, my Lords, that, in one of the opinions given in this case, this is treated as a matter of form—I take it to be matter of substance. The learned Judge who has made that observation says, that if they had acted under error in judgment, that might be a ground for invalidating the judgment; but it was simply an error in point of form. Now, I apprehend the error in point of form was substantial; for they had no authority whatever till that form was complied with, and till the minor heirs of entail were brought properly before the Court, so as to have persons to act for them, and to take care that nothing was done to their prejudice; and although they were named in the process, yet, not being brought properly before the Court, it was a proceeding as much without authority as if they had not been named. It is upon these grounds I concur in the opinion of the noble and learned Lord. I have thought it very important to state just so much upon the subject, that I wish it to be understood that it is not for any error in judgment in the Court of Session that I think these purchases are void. If the Court of Session had decreed in a suit properly brought, mere error in judgment would be no ground for setting them aside. If the Court of Session had proceeded in a cause in which all the proper parties were represented, yet if, in the end, justice had been done, though the order of sale which was directed by the act of Parliament had not been pursued, I think that would not have been a ground for overturning the whole of that which has been done; but they proceeded without calling before them those persons whom the Legislature, when it passed that act, particularly intended should be called before them; for it is evident that the Legislature acted with peculiar caution—that they felt that there were interests which ought to be particularly guarded. They directed a new suit, and directed who should be the parties by the very terms of the act of Parliament; but the Court of Session have proceeded without calling before them the most material parties to that suit. On that ground, I concur with the noble and learned Lord, that all the proceedings under the supposed authority of the act of Parliament were without foundation—that they must be therefore wholly voided—and that the Court of Session must be directed to proceed in the cause in the manner which has been stated by the noble and learned Lord, having all persons properly before the Court.

Appellant's Authorities.—4. Ersk. 7. 14; 1. Dow, 18; 4. St. 20. 21; 2. Ersk. 2. 4; 1. Ersk. 7. 13; 1. St. 6. 31; 4. Ersk. 3. 6; Powell on Powers, 113; Sugden on Powers, 176; 3. East, 439; Downie, Dec. 19. 1815, (not rep.)

Respondents' Authorities.—4. Ersk. 1. 22; Brown, Feb. 18. 1675, (5169); Cockburn, Nov. 26. 1725, (5182); Wilson, July 6. 1757, (5184); Irvine, Feb. 28. 1771, (5187); Lane, Jan. 17. 1782, (5179.)

FRASER,—SPOTTISWOODE and ROBERTSON,—J. CHALMER,—Solicitors.

(*Ap. Ca. No.* 44.)

CASES

DECIDED IN THE HOUSE OF LORDS

ON APPEAL FROM THE

COURTS OF SCOTLAND,

1823.

Rev. ROBERT SCOTT, Appellant.—*Jeffrey—H. Lumsden.* No. 52.
CHARLES MACDONALD and Others, Respondents.

Cessio.—Circumstances under which it was held, ex parte, (affirming the judgment of the Court of Session,) that a clergyman, who was found entitled to the benefit of the cessio, was obliged to assign to his creditors £75 out of his stipend annually.

March 5. 1823.

2D DIVISION.

THE Rev. Mr. Scott, minister of the parish of Glenbucket in Aberdeenshire, having become insolvent, and been imprisoned, brought a process of cessio bonorum against his creditors. He stated that his stipend amounted only to £33: 6: 8, which could not be augmented by the Court of Teinds; that, in virtue of the 50th Geo. III. c. 84, it had been increased to £150; that he had a glebe of five acres of land; that his other funds amounted to about £600; and that his debts consisted of £2800, (which had been contracted as cautioner for a brother,) and £450 due by himself. He also stated that he had a wife and family,—that she was entitled to the liferent of £800, inclusive of his jus mariti,—and that, from the remote situation in which he was placed, many of the more essential necessaries of life were very expensive. His creditors did not oppose the cessio being granted, but contended that he was bound to assign to them a part of

March 5. 1823. his stipend, and of the allowance under the statute. To this he answered,—

1. That it had never hitherto been distinctly settled that the stipend of a clergyman was liable to be attached by diligence, and that, in point of principle, it was equally as much entitled to be preserved entire for his maintenance as the salaries of Judges, being like them strictly alimentary.

2. That supposing that any part could be attached, it was always a question of circumstances how much ought to be so, and that, in the very peculiar situation in which he stood, an extremely small portion ought to be allowed of that which was properly his stipend. And,—

3. That the provision made by the statute was distinguishable from the stipend, being granted purely for the aliment and subsistence of poor clergymen, and therefore could not, consistently with the purposes of the Legislature, be carried off by diligence.

The Court found him entitled to the benefit of the cessio, but that he was bound to assign to his creditors one half of the stipend of £150 payable to him. Against this interlocutor he reclaimed, and the Court, on the 18th of February 1817, so far varied the interlocutor 'as to direct that the pursuer, in his disposition 'omnium bonorum, shall, in due and regular form, assign to the 'creditors an annual sum of £75 sterling, in part of the stipend 'payable to him as minister of Glenbucket, for all future years 'during his incumbency, reserving to himself the remaining emo-'luments of his said office;' and thereafter, on the motion of the creditors, ordained him to deliver receipts to their trustee of the part of the stipend and allowance so to be assigned by him, in order that they might be enabled to uplift the amount.*

Against these interlocutors, so far as they ordained him to assign any part of his stipend, Mr. Scott appealed. No appearance was made, nor Case lodged for the creditors; but the House of Lords, after hearing his counsel, 'ordered and adjudged that 'the said petition and appeal be, and is hereby dismissed this 'House, and that the said interlocutors therein complained of be, 'and the same are hereby affirmed.'

Appellant's Authorities.—1. Fount. 46; 4. Connell, c. 5; 2. Bell, 636.

J. CHALMER,—Solicitor.

(*Ap. Ca. No. 2.*)

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* See Fac. Coll. 11th March 1818, foot note, p. 505.

THOS. GRAHAM, Appellant.—*Gifford—Wedderburn—Alison.* No. 53.
JAS. GRAHAM, Respondent.—*Warren—Sugden—Robertson.*

Mutual Contract.—An estate having been left to a natural son, on condition of not marrying a certain lady, under a penalty of forfeiture in favour of the testator's brother, who was in India; and having made a compromise with the attorneys of the brother, (knowing that they had no authority to do so,) by which he agreed to marry and forfeit on condition of payment of one half of the value of the estate; but reserving to the brother to say whether he would put any value on the mansion-house and political interest of the estate; and having married, and decree of forfeiture being pronounced against him in favour of the brother, (who hitherto was ignorant of the transaction); and the brother having afterwards taken possession and paid the stipulated value, but declined to put any value on the house and political interest; and the son having declared that he had no legal claim against him; but thereafter having brought an action against him for one half their value, and the Court of Session having valued them, and decerned against the brother, the House of Lords reversed the judgment.

March 5. 1823.

2D DIVISION.
Lord Craigie.

THE late George Graham, Esq. was proprietor of the estate of Kinross, extending to about 245 acres, on which there was a large mansion-house. The remainder of the estate consisted entirely of superiorities, containing about £10,000 Scots valuation, and yielding a revenue of feu-duties to the amount of about £1200. Mr. Graham had no lawful issue; but he had a natural son, the respondent, by a French lady. His heir-at-law was his brother, the appellant, Mr. Thomas Graham, who resided in India. Mr. Graham having educated and brought up the respondent as if he were his lawful son, executed several deeds of settlement in his favour; but having discovered that he had formed an attachment to a Miss Muter, of which he disapproved, he, on the 27th of July 1801, executed a trust-settlement, by which he recalled the former deeds, and conveyed his estate to trustees, (one of whom was the appellant); 'declaring always that 'these presents are granted by me in trust only, for the use and be-'hoof of myself during my own lifetime; and at my death, in the 'event specially after mentioned only, for the use and behoof of 'James Graham, my only son in life, procreated betwixt me and 'Mrs. Genevieve Piquet, now deceased, formerly of the parish 'of St. Hyppolite, fauxbourg St. Marcel, and city of Paris, 'and the heirs male or female lawfully procreated of his body; 'whom failing, for the use and behoof of any future heirs 'male or female that may be lawfully procreated of my own body; 'whom failing, the said Thomas Graham, my brother consan-'guinean, one of my said trustees, and the heirs lawfully pro-'created of his body.' But declaring, 'That whereas the said 'James Graham, my son, has for this some time past formed

March 5. 1823. ‘ or threatened to form a matrimonial connexion with Miss —— ‘ Muter, daughter of Mr. —— Muter of Annfield, much con- ‘ trary to my wishes or intention; and that it is my fixed deter- ‘ mination, if he either already has formed or shall hereafter ‘ form such connexion with that lady, or with any other lady, ex- ‘ cept Miss Anna Maria Graham, eldest daughter of the said ‘ Thomas Graham, my brother consanguinean, without my con- ‘ sent, or the consent of the majority of my said trustees sur- ‘ viving and accepting at the time, that the said James Graham ‘ shall take nothing under the present settlement, he being thereby ‘ in such event expressly excluded and debarred from any share ‘ of my said estates, real and personal; therefore the said trustees ‘ shall only denude in favour of the said James Graham, my son, ‘ in the event of his having married, excepting as said is, with ‘ my consent, signified in any way, or marrying with the consent ‘ of a majority of my said trustees surviving and accepting at the ‘ time, previously had and obtained in writing, and no otherwise; ‘ and in the event of his dying unmarried, or marrying without ‘ consent as aforesaid, (excepting as said is,) the said trustees ‘ shall, immediately after either of these events happening, de- ‘ nude of my foresaid lands and whole other estates, real and ‘ personal, in favour of the next person appointed to take under ‘ the substitution before set down, who shall be at liberty to enter ‘ into the possession of the said landed and personal estate in the ‘ same way as if the said James Graham had never been men- ‘ tioned in this deed; he and the heirs of his body procreated of ‘ any marriage, without consent as aforesaid, being hereby totally ‘ excluded from taking any thing in virtue of this deed, except- ‘ ing such payments, by way of a reasonable annuity, which my ‘ said trustees are to be the judges of, which he may have ac- ‘ tually received previous to the marriage.’ On the 11th of December 1801 Mr. Graham died, and the respondent then applied to the trustees in this country to consent to his marriage with Miss Muter, but they declined to do so. On the 16th of July 1802 he wrote to the appellant in India, stating, ‘ that as the ‘ trustees are steady in refusing their consent to my marriage ‘ with Miss Muter, and Dr. Moir has declared his opinion also ‘ against it, so that your and Colonel Park's consent would not ‘ now have any effect in my favour, farther than satisfying the ‘ world that those who may be supposed to have the greatest ‘ respect for my father's memory do not consider such consent as ‘ any dereliction of that sentiment; but, as matters now stand, ‘ I have proposed a compromise, and this seems at least not to be

'disapproved of by my trustees, as you will see mentioned in their 'minutes enclosed. Being determined, if I can save as much of 'my fortune as will ensure a competence, to fulfil my engage- 'ments to Miss Muter, if you, as the next in succession, will give 'me one half of the free property, whatever it is, at the date of 'your succession, I will marry, and forfeit in your favour. To 'one to whom I have always been taught to consider as possessed 'of generosity and justice, I need not urge much to recommend 'this partition. The object of it is honourable; and it would 'make me happy, and add from £15,000 to £20,000 to your 'fortune, which, I hope, might complete your independence, and 'enable you to return to your native country and your friends. 'I name no particular sum as the price of my forfeiture, because 'it is not quite certain what the value of the estate may be; but 'if a fair division takes place, there can be no difficulty, as, if it 'is worth £10,000, I would on that footing get £5000; if worth '£40,000, I would get £20,000. You could not lose, and my 'object behoved to be attained.' March 5. 1823.

In a communication which was made by the appellant to his co-trustees, before he had received the above letter, he stated that he did not conceive that they had the power to consent to the respondent's marriage with Miss Muter; and that, even if they had, still, as it was plainly contrary to the wish of the late Mr. Graham, he could not assent to it.

Previous to this time, the appellant had constituted a Mr. Templar and others as his attorneys in London, for the recovery of his debts in Britain; and on the 7th of September 1802 the respondent, after some communings, and being aware of their limited powers, addressed this letter to them:—'Having formed 'my resolution relative to the succession of my father's pro- 'perty, and having determined rather to marry the lady of my 'choice, with a part of the inheritance, than enjoy the whole 'without her, I hereby offer to incur the irritancy contained 'in my father's trust-deed, and forfeit thereby all right in the 'succession to his estates, provided you, as the attorneys of 'my uncle, Mr. Thomas Graham, will take upon you to pay to 'me a sum equal to the value of the half of my father's whole 'property, heritable and moveable, as the amount of that value 'shall be determined at the date of my marriage and consequent 'forfeiture. In order to ascertain that amount, I hereby agree 'to refer the same to the opinion of William Adam, Esq. of 'Blair-Adam, who, from his friendship for both parties, and the 'vicinity of his estate to the estate of Kinross, must be a most 'desirable referee.'

March 5. 1823. This letter was transmitted by the respondent's agent, Mr. Campbell, to Mr. Templar, who, on the 8th of the same month, returned this answer:—'I received your letter enclosing Mr. 'James Graham's proposals. I cannot say they meet my ap- 'probation in the shape sent me. My objection is not to the 'sum demanded, but the way it is to be paid. To value the estate 'as if a purchaser were to take it, is and must be hostile to the 'interest of Mr. Thomas Graham. I do not view this in the 'light of advantage to him; it is a mere whip syllabub, as pro- 'posed, all froth and no substance. I beg to propose this amend- 'ment—the house is a drag-chain, and will cost £4000 or £6000 'to put it in repair.—My proposal is as follows:—Mr. G. Graham's 'debts in the first place to be paid, and all mortgage debts of 'course.

'The remainder of the personal estate to be then divided,— 'a moiety to each.

'The moveables, such as plate and linen, to be equally divided, 'and each sell or retain his moiety.

'The net rental of the estate for the last seven years to be 'ascertained from Mr. Graham's factor, in which shall be included 'any lands Mr. Graham kept in hand, but the house of Kinross 'shall not be valued. This net rental shall be divided.

'I hope my proposals are sufficiently clear to be understood, 'and as the demand made so far exceeds what the attorneys were 'given to expect would be demanded, there can be no difficulty 'in Mr. Graham's acceding to them. My mode does not lessen 'his demand, but only fixes the precise mode by which the estate 'shall be valued; for I still retain my opinion, if the valuation is 'to be fixed by any other criterion, Mr. Thomas Graham is better 'without it, because it may induce him to come home expecting 'an income to live on out of the estate, when he will only find 'himself encumbered with a large old house going fast to decay, 'and a few cocks and hens from the feu-duties. Being a land- 'holder, I too well know what imaginary rents are. I have pro- 'posed the average, and Mr. John Græme's accounts will exactly 'ascertain them, and I have fixed the price of them at twenty- 'five years purchase.' On receiving this answer, the respond- ent, on the 17th of September, again wrote to the appellant's at- torneys in these terms:—'The mode in which I propose the 'transaction with my uncle should be carried into execution is 'this—Upon receiving a missive letter from you, agreeing to 'pay me a sum equal to half the value of the heritable property, 'and to deliver to me one half of the whole personal property as

'it stands, I shall accomplish my marriage with Miss Muter March 5. 1823.
'without delay, and will thereby, in terms of my father's settle-
'ment, forfeit his property. By that act, my uncle instantly ac-
'quires a right to the estates, real and personal, and the trustees
'should convey the same to him. But in order to make matters
'quite clear, and prevent the trustees from raising any objections,
'you, by your attorneys in Scotland, will, immediately on my
'marriage, raise an action of declarator before the Court of Ses-
'sion in Scotland for having it declared, that, in terms of the
'trust-deed executed by the deceased George Graham, the pro-
'perty now belongs to Thomas Graham, and that the trustees
'should denude in his favour. I think that by Christmas this
'might be concluded, and then the trustees, who have been put
'in possession by the conveyance in their favour executed by my
'father, will be obliged to give a warrant for putting Mr. Thomas
'Graham in possession. Thus he will acquire a right instantly
'upon my marriage, and his right will be legally completed in
'point of security by the conveyance by the trustees. There are
'some other steps necessary for completing the right, so as to
'enable my uncle to vote and be elected a member of Parliament,
'which Mr. Campbell will explain; but he will be secured in the
'possession by the steps I have mentioned. As to my security,
'as soon as Mr. Keith and Mr. Adam have determined what the
'amount of my half of the heritable part of the property shall be,
'you, as my uncle's attorneys, after his right is made up, can grant
'me securities upon the estate for the same, bearing interest from
'the date of the marriage; these securities not to be moveable
'without your consent, till the lapse of a limited time to be fixed
'by Mr. Adam. The insurance on my uncle's life, being a se-
'curity in which all are interested, together with all other inci-
'dental charges, I have no objection to their being paid out of
'the total property, so that each shall pay a half; and in con-
'sideration of your paying me, or securing me in the half as soon
'as it is ascertained, I, for your security, bind myself and my
'heirs, in case my uncle should succeed in a suit for repayment
'of said half, to relieve you of the same, in so far as you might be
'liable for your interference. This is the plan hinted at in my
'letter of the 7th current, and to which I refer.'

Some objections, however, having been made by the attorneys with regard to the house and political interest at a meeting which they had with the respondent, on the date of the above letter, he subjoined to it the following explanation:—'Since writing the 'above, I so far alter my proposal, that, in terms of your request,

March 5. 1823. 'I agree to leave the value of the house of Kinross, and of the 'political interest attached to the estates, entirely out of view at 'present, referring these to my uncle himself, either as he shall 'give you directions in reply to your communication to him, or as 'he shall determine their value when he returns to this country. '—In the possible event of death, I shall agree to accept of the 'sum arising from the insurance of £20,000, as the amount of 'my compromise.' On the following day, being the 18th of September, the appellant's attorneys wrote to the respondent and his agent this letter:—'As, according to the law of Scotland, Mr. 'Thomas Graham, or his attorneys for him, can be put in possession of the estate, so that he can sell or dispose of it at his own 'pleasure, we have no hesitation to say, in reply to your letters of 'the 7th and 17th instant to us, as his attorneys, that we are ready 'to accept on his behalf of the terms you propose; videlicet, after 'paying, according to the will, all debts and encumbrances, to account with you subsequent to the forfeiture and surrender to 'him, Thomas Graham, of all the late Mr. George Graham's 'estates, for one half of the value of the whole, this value to be 'determined by Mr. William Keith, under Mr. William Adam's 'approval, as our sole referee, of course liable to all claims that 'may hereafter be made within a reasonable time to be limited 'by Mr. Adam. It will be necessary for our security, as agents 'to Mr. Thomas Graham, to require the affidavits tendered by 'yourself and Mr. Campbell.'

In consequence of this arrangement, the respondent married Miss Muter on the 4th of October.

The trustees of the late Mr. Graham thereupon raised an action of declarator of forfeiture against the respondent; and on the 25th of January 1803 decree was pronounced without opposition, finding the respondent's right forfeited, and the estate to belong to the appellant.

This compromise and this decree took place before it was possible to have any communication with the appellant in India on the subject. On the 8th of April 1803 he wrote to the respondent, stating, that 'I had the pleasure, only a few days 'ago, of receiving your favour of the 16th of July last. The 'proposal therein contained, of forfeiting on condition of receiving half, having been already acceded to by my attorneys, 'and confirmed by me, it becomes unnecessary here to go further 'into the consideration of it, than to assure you that I have derived infinite satisfaction from the reflection that they have 'acted in this business in a manner so consonant to my own

'disposition and sentiments, and I shall rejoice if you shall have 'reason to consider me as having been in any shape instrumental 'to the completion of your happiness. You would learn by my 'letters to my dear Mrs. Graham, that, had you incurred the for- 'feiture of Kinross without previous stipulation, it was my desire 'that your situation should be made comfortable. I am better 'pleased, however, that matters have been arranged in the way 'they have, as it obviates the risk to which you might have been 'exposed from whim, caprice, or any change of sentiment on my 'part, while it secures to me, without question, the enjoyment of 'what you have surrendered.' He also added, 'That having little 'doubt of the information given to me some days ago by Mr. 'Anstruther being correct, when he read an account of your mar- 'riage of the 10th October, I beg leave to offer you and Mrs. 'Graham my most sincere congratulations on the occasion, with 'best wishes for a long enjoyment of that domestic felicity only 'to be found in the marriage state. I trust the day is not far 'distant of having the happiness of assuring you personally how 'much I am your affectionate uncle.' Subsequent to this, the appellant sent a new power of attorney, with more extensive authority than he had formerly given, and to settle with the respondent. In his communications, however, to the attorneys, he stated that he did not conceive that any value should be put on the mansion-house and the political interest of the estate. March 5. 1823.

In prosecution of the compromise, a submission was made to Mr. Adam; and the parties (in consequence of the death of Mr. Keith) requested Mr. Selkrig, accountant, to ascertain, 'so far 'as you are able, from the best evidence you can obtain, what is 'the real value of the estates of Kinross, Lochleven, and Cleish, 'the houses in Edinburgh, and all the other heritable property 'belonging to the deceased George Graham, and conveyed by 'him to certain trustees, conform to trust-deed and settlement 'dated the day of ; but excluding from such 'valuation the house of Kinross, and political interest attached to 'the estates, except in so far as a Crown holding is preferable, in 'the general case, to a holding of a subject.' Mr. Selkrig accordingly made a report, estimating the value of the feu-duties at about £30,000, but excluding from his valuation the mansion-house, and the political interest arising from the freehold qualifications afforded by the estate. On considering this report, Mr. Adam, on the 16th of August 1805, issued this award:—'I per- 'fectly approve of the principles on which Mr. Selkrig has esti- 'mated this property, and I think the parties should take the

March 5. 1823. 'property, and make the division, according to this valuation; and 'I decide, according to the powers vested in me, that they do 'make the division accordingly; and I do not consider that any 'of the articles stated in the remarks should be allowed to con- 'stitute any part of the value. I make one exception, however, 'to this generality. I consider that the avenue and green of Kin- 'ross house should be valued as grass, and not for tillage, as it 'never can, consistently with the enjoyment of the house of Kin- 'ross, be under the plough. This reduces the annual value of that 'article from £72. 8s. to £42, and must reduce the estimated 'value of the fee-simple 26. years purchase upon the sum of '£30. 8s. Subject to this deduction, my award is, that the value 'put by Mr. Selkrig be the value on which the parties are to 'transact.'

On the 26th of March 1806 a meeting took place with a view to a settlement between the respondent and the appellant's attorneys, when he addressed to them this letter:—'As the 'accounts between my uncle, Thomas Graham, Esq. and my- 'self, so far as respects the heritable property of my late father, 'George Graham, Esq. of Kinross, are now finally settled, and 'mutual discharges ready to be granted by you, as my uncle's 'attorneys, and myself; and as it appears to be your wish to have 'some information respecting my ideas of the points reserved 'in the submission to Mr. Adam, viz. the value of the house 'of Kinross, and the political interest of the estate, I have no 'hesitation in declaring that I have no legal claim on my uncle, 'Thomas Graham, Esq. for either of these subjects; but that, in 'terms of my agreement with my uncle's former attorneys, they are 'to be referred entirely to my uncle himself.' Accordingly, a mutual discharge was executed, by which 'the said attorneys on 'the one part, and the said James Graham on the other part, do 'hereby mutually exoner, acquit, and discharge each other of the 'foresaid docquoted account, and whole articles therein contained, 'import and effect of the same, as well as all claims competent to 'them or either of them, or their constituent, in virtue of the 'foresaid reference, in so far as regards the said whole heritable 'property belonging to the said deceased George Graham, Esq. 'of Kinross.'

The appellant returned from India in 1808, and thereupon took possession of the estate of Kinross, and resided with his family in the mansion-house. Having declined to allow any thing on account of the house and the political interest of the estate, the respondent, in 1815, raised an action against him before

the Court of Session. In the summons he stated the nature of his father's trust-deed, the compromise made with the appellant's attorneys, the respondent's marriage, and the decree of declarator of forfeiture; and that, 'in terms of the original 'agreement entered into by the missives, and explanatory post-'script above recited, and of the report and valuation made in con-'sequence thereof, and of the mutual discharge above recited, it 'thus appears, that although the pursuer was to receive from the 'defender the just and equal half of his father's whole estate and 'property, heritable and moveable, yet the value of the mansion-'house and pertinents, and of the superiority and political in-'terest attached to the estate of Kinross, and also to that part 'of the deceased George Graham's property lying in the county 'of Fife, have never been valued or ascertained.' He, however, did not allege that the attorneys, with whom the compromise had been made, had power to enter into it, nor that it had been sanctioned and approved of by the appellant before the decree of forfeiture, or that he had subsequently done so. The conclusion of his summons was, that 'it ought and should be 'found and declared, by decree of our Lords of Council and 'Session, in either of the Divisions of the said Court, that in terms 'of the aforesaid missive letters, of date the 7th, 17th, and 18th 'days of September 1809, and postscript thereto above men-'tioned, the pursuer is justly entitled to one half of the true 'value of his deceased father's whole property, heritable and 'moveable, of whatever nature or extent the same may be; and 'that, in ascertaining the value of the heritable property as afore-'said, the value of the mansion-house, offices, pigeon-house and 'others connected therewith, and the additional value of the green 'avenue or pleasure-grounds as an appendage thereto, and also 'the value of the superiority, and political interest arising there-'from, all pertain to and make part of the heritable estate of 'the said deceased George Graham; and the value of all which 'not having hitherto been either ascertained or paid for by the 'defender, our said Lords ought and should allow a proof to be 'taken of the true worth and value of the said remaining whole 'heritable estate, and parts, pertinents, and appendages thereto 'belonging, and thereafter fix and ascertain the just and true 'amount of the value thereof, and find and declare that the pur-'suer, in terms of the aforesaid transaction entered into between 'him and the attorneys of the defender, and of the forfeiture by 'him of the estate of Kinross, and other heritable property in 'the defender's favour, and possession following thereon, is en-

March 5. 1823.

March 5. 1823. 'titled to the just and equal half of the value so to be ascer-
'tained, with the interest thereof from the date of the pursuer's
'marriage, and consequent forfeiture in the defender's favour;'
which he estimated at £15,000.

Various defences were stated by the appellant; and particularly, that, from the nature of the agreement, it was left entirely to his discretion to say, whether he would allow any value for the house and political interest, or not; that he had declined to allow any value; and that it was not competent for a Court of Law to affix any value to political interest derived from the possession of superiorities.

Lord Craigie, before answer, remitted to 'Messrs. Alexander 'Duncan and James Thomson, writers to the signet, to state 'what, in their opinion, would have been the value of the 'mansion-house on the estate of Kinross, and of the political 'influence attached to the estate in the year 1808, when the 'defender returned from India to Britain.' His Lordship at the same time issued this note:—'The Lord Ordinary is of 'opinion, that by the agreement concluded between the pursuer 'and the defender's trustees, to which the defender afterwards 'acceded, the pursuer was entitled to one half of the value 'of the lands and estate of Kinross, as the same should be 'estimated by certain persons therein named, with one exception 'only as to the mansion-house, and the political influence attached 'to the estate, upon which a value was to be put by the defender 'himself.

'The Lord Ordinary is further of opinion, that, in virtue of 'the reference thus made to the defender, he was not authorized 'to put an elusory value upon the subjects, and, least of all, to 'refuse to put any value at all upon the subjects; or, in other 'words, to appropriate to himself, without any recompense, what, 'as stated by the pursuer, would have yielded several thousand 'pounds, if the estate had been exposed in the ordinary way; and 'what renders such a proceeding particularly exceptionable is, 'that, with the concurrence and approbation of the defender and his 'trustees, the valuators formerly employed had rated a part of the 'subjects falling under the reference to them at a lower sum than 'they would otherwise have done, on account of its connexion with 'those upon which the defender was to put a value. The Lord Ordi-'nary, however, has not pronounced any interlocutor upon the rele-'vancy of the pursuer's claim, having delayed this till the report 'of Messrs. Duncan and Thomson has been obtained, so that he 'may at once give a determination upon the whole matters in 'dispute.'

Against this interlocutor the appellant reclaimed; and the Court, on advising his petition with answers, 'recalled the interlocutor complained of, and found that, by the transaction 'entered into between the pursuer and the attorneys of the defender, and afterwards approved of by the defender, it was referred to the defender himself to put a value upon the house 'of Kinross, and the political interest attached to the estates, 'on his return to this country; that the defender was bound 'to put a value on the said subjects; and ordained the defender, 'before further procedure, to put in a special condescendence, 'signed by himself, of the value he put on the said subjects 'at the period of his return from India.' To this interlocutor their Lordships afterwards adhered, and refused leave to appeal. March 5. 1823.

The appellant having lodged his condescendence, the Court appointed the respondent to give in a condescendence as to what he averred was the value; and thereafter, on advising memorials relative to the political interest, found that 'it was expedient in 'this cause to send an issue or issues to be tried by a Jury, in 'terms of the statute, as well with regard to the value of the 'political interest, as to the value of the house.' The following issues were accordingly sent to the Jury Court:—

'1. What was the value of the mansion-house and offices upon 'the estate of Kinross, at the time the defender succeeded to the 'said estate, under the transaction with the pursuer?

'2. What was the surplus value of the policy or pleasure-'ground about the said mansion-house at the time aforesaid, over 'and above the value accounted for under the reference to Mr. 'Adam, and consequent settlement?

'3. What was the value of the superiorities and political in-'terest upon the said estate, and those lying in the county of 'Fife, to which the said defender succeeded in virtue of said 'transaction, at the time the defender so acquired right to them?'

These issues having been tried, the Jury returned this verdict:—'That in respect of the matters of the said issues 'proved before them, they find, in regard to the first issue, that 'the value of the mansion-house and offices upon the estate of 'Kinross, at the time the defender succeeded to said estate under 'the transaction with the pursuer, was £5000 sterling. In regard 'to the second issue, find that there was no surplus value of the 'policy and pleasure-ground about the said mansion-house, at 'the time aforesaid, over and above the value accounted for under 'the reference to Mr. Adam, and consequent settlement; and, in

March 5. 1823. 'regard to the third issue, find that the value of the superiorities 'upon the said estate, and those lying in the county of Fife, 'deducting the value of the feu-duties, casualties, and services 'already paid for, to which the said defender succeeded in virtue 'of said transaction, at the time the defender so acquired right 'to them, was £7845. 8s. sterling.' In consequence of this verdict, the Court found, 'That the pursuer is entitled to receive from 'the defender one half of the said sums, amounting to £6422. 14s. 'sterling, and decerned accordingly;' and thereafter, on advising memorials as to a claim by the respondent for interest, their Lordships found, on the 14th of May 1819, 'That, under the whole 'circumstances of this case, the sum of £6422. 14s. sterling found 'due to the pursuer, and decerned for, should bear interest from 'and after the term of Martinmas 1808;'—found the pursuer entitled to his expenses, and decerned accordingly.*

Against these judgments the appellant appealed, and contended,—

1. That as his attorneys (with whom the respondent voluntarily transacted suo periculo) had no authority to enter into the compromise, the appellant could not be bound by it to any greater extent than that to which he had consented:—that he had declined to give anything on account of the house and political interest; and, besides, as it was left to his discretion to say whether he would allow anything for them, it was not competent to compel him to do so.

2. That the summons did not allege that the appellant had ever consented to the transaction with the attorneys, but merely averred that he had entered into possession by virtue of that transaction, and of the decree of declarator, which was not qualified with any condition that the appellant should pay any thing to the respondent, and was of itself a sufficient title; and therefore the summons did not state any cause of action which could warrant the decrees that had been pronounced.

3. That the agreement was in itself of such a nature as a Court of Law could not enforce, being an attempt to defraud the will of the truster.

4. That political interest was not a subject on which a Court of Law could put a value; and that, in interpreting the contract, the Court was not entitled to assume that by political interest was meant the superiorities; and that, even if it were so held, it could not have been the intention of the parties that these supe-

* Not reported.

riorities, independent of the feu-duties, (of which the respondent had received one half,) were to be valued; because it was not possible to convert the superiorities into money, and at the same time to reserve the feu-duties. March 5. 1833.

5. That the Court were not entitled to send an issue to the Jury Court to estimate the value of the superiorities, seeing that the agreement referred specially to 'political interest,' and the interlocutor, by which it was found expedient that the case should be tried by Jury, was limited to 'political interest;' and besides, that the verdict merely estimated the value of the superiorities, without saying anything as to the political interest, so that no answer had been made as to the point on which the Court made the remit: And,—

6. That, at all events, as the sum decerned for had not been ascertained and constituted till the verdict of the Jury, it was not consistent with law to find the appellant liable in interest prior to that period.

To these pleas it was answered,—

1. That the appellant, both by his letters and by his acts and deeds, had sanctioned and homologated the transaction with his attorneys generally, and he was not now entitled to object to it; and therefore, if he refused to put a value on the subjects, as to which he was made the arbiter, a Court of Law was entitled to interfere and do justice.

2. That although it was not expressly stated on the face of the summons that he had sanctioned the agreement, yet it was substantially so averred there, and expressly on the record of the process.

3. That the agreement was perfectly legal; and it was extremely doubtful whether the condition imposed in the trust-deed on the respondent was effectual in law; and if it was not valid, the agreement was undoubtedly unobjectionable.

4. That by political interest the parties meant the value of the superiorities, which of themselves, and independently of the feu-duties, and as giving an elective franchise, had a commercial value, and accordingly were daily sold and bought.

5. That, in remitting the case to the Jury Court, the words 'political interest and superiorities' had been used synonymously, and as explanatory of each other; so that there was nothing inconsistent between the interlocutor and the issue, nor between the issue and the verdict: And,—

6. That as the appellant ought, on his arrival from India, to have put a value on the subjects, and paid the one half to the re-

March 5. 1823. spondent, and as he failed to do so, the respondent was entitled to interest from that period.

In the course of the discussion at the Bar on the above points,

The LORD CHANCELLOR asked—What is the letter you say contained what the law would call a ratification? The letter in 1803 does not prove that the appellant knew that the marriage had actually taken place, and that the respondent had at that time forfeited.

Mr. Sugden.—At the bottom of the original letter of 5th April 1803, it appears that he approved of the marriage.

LORD CHANCELLOR.—Suppose that to be so; but could any Court be a party to an agreement, because he afterwards approved of the marriage—that marriage taking place without his knowledge—and at any rate, whatever may be the feelings among parties, nothing can be clearer than this, that where a trustee and devisee set about together to disappoint the will of a testator, it should be as clear as daylight what is meant, before a Court ought to interfere. It is impossible in the nature of the thing, that, when he wrote in 1803, he should know of the marriage. Then the question upon that letter will be this:—Supposing he had given his consent to the marriage antecedent to the marriage, and it took place upon that antecedent consent, and so taking place he was bound; yet, if it had not been had before the marriage, would he have been bound at all?

Mr. Warren.—I will state the words of the letter which are not printed. It is stated that he approved of the whole transactions. The letter is dated the 8th of April 1803, from Calcutta, part of which is set out at the bottom of page 6. In that letter there are these words:—'Having little doubt of the information 'given me some days ago by Mr. Anstruther being correct, when 'he read an account of your marriage of the 10th October.'

LORD CHANCELLOR.—Take this along with you. You yourself state in your Case, that, before any communication could reach the appellant, the marriage took place.

Mr. Warren.—That is so, certainly.

LORD CHANCELLOR.—Then the question would arise—Suppose Mr. Thomas Graham had agreed, before the marriage, that the forfeiture should not operate wholly, could he, or could he not, have insisted that it should, after it had taken place?

Mr. Warren.—I apprehend that might depend upon the terms of the letters subsequently written. His words are, 'Having 'little doubt of the information given me some days ago.'

LORD CHANCELLOR.—That is subsequent to the marriage taking place. March 5. 1823.

Mr. Warren.—It is not in the printed Case, my Lord; it is a letter of the 8th of April 1803, part of which is in the printed Case. But what I am going to read is not, and it is this:—'Having little doubt of the information given to me some days ago 'by Mr. Anstruther being correct when he read an account of 'your marriage of the 10th October, I beg leave to offer you 'and Mrs. Graham my most sincere congratulations on the occa-'sion, with best wishes for a long enjoyment of that domestic fe-'licity only to be found in the marriage state. I trust the day is 'not far distant of having the happiness of assuring you per-'sonally of how much I am your affectionate uncle, Thomas 'Graham.'

LORD CHANCELLOR.—I suppose nobody will deny that if, before that letter was written, you had brought an action in the Court of Session to implement this agreement, you could not have succeeded. Will that letter give you such a right?

Mr. Warren.—He wrote it with a view to all the preceding transactions, and writes it as confirmatory of the transactions entered into by his attorneys with his nephew.

In reference to the question as to the political interest,

The LORD CHANCELLOR observed:—Without prejudice to any observation on the law of Scotland, let us see what the law of England would be. Suppose two persons had made an agreement, each to purchase the political interest of the other; and from the agreement it should be clear that the political interest was to have a value set upon it, and set upon it by the individual himself; and taking it that the law of England is that which we suppose it to be—not meaning to say it is, or it is not:—if the individual would not put a value upon the political interest, would any Court put a value upon political interest? But an issue has been here directed to find what is the value of the superiority and the political interest; and the verdict states only the superiority; but the verdict does not go to the whole of the issue.

In regard to the objection as to the terms of the summons,

The LORD CHANCELLOR observed:—In the first place, I would ask you to be kind enough to look at your summons. It proceeds upon this, that this Mr. Graham was in India, and that these persons were his attorneys, who could not, without his previous authority or subsequent authority, enter into such a transaction as this for him. The agreement, you will observe, is in September 1802. This gentleman marries immediately after-

March 5. 1823. wards, and then there is a long period before it was possible that Mr. Thomas Graham could know anything in India of the matter. Then there is an action of declarator, raised in the Court of Session, stating to that Court there had been a forfeiture of the estate, which action is followed by a decree of forfeiture so early as January 1803. Now I should be glad to know the effect of that. The estate is forfeited, and a decree of forfeiture is pronounced in January 1803, previous to April 1803; and of course I suppose nobody can say, that when Thomas Graham, the appellant, wrote the letter in April 1803, he was cognisant of the fact that there was that action and forfeiture. I wish, therefore, to know —however honest and proper the agreement might have been in a moral point of view—whether Mr. Thomas Graham could be compelled to act under that agreement, entered into by his attorneys? It is stated in the summons, 'that the said Thomas 'Graham is now in possession, in virtue of the aforesaid transac-'tion and agreement.' But if that was the transaction or agreement, and if he could not be recognised as being acquainted with the nature of this agreement between these two parties, could your client, under this testator's will, and after the decree of forfeiture, have gone to the Court to rescind this decreet; and if not, could that decree be a ground for carrying into effect any part of the agreement?

Mr. Sugden.—The action was raised by the trustees under that agreement.

LORD CHANCELLOR.—But they had a right to sue; and if, in the execution of their duty, they had a right to sue, and to call upon the Court to have a forfeiture declared, then the question is—Whether, after such a transaction, the Court will interfere as to any part of such agreement? The first thing is, to get rid of the want of the allegation in your summons of the subsequent approbation of the agreement.

Mr. Warren.—It appears by the letter of April 1803 that the whole of these transactions must be considered as ratified by Thomas Graham, for he takes his share of moveables.

LORD CHANCELLOR.—He did; but that was by virtue of the decree, which had passed without his knowing anything of it.

Mr. Warren.—He would not perhaps know what were the terms, though he knew of the thing that was to be done. I am not sure whether your Lordships mean that something more ought to be stated.

LORD CHANCELLOR.—I do not think his approbation is sufficiently shown in the summons. You are called upon to make such an allegation in the summons, and not to act upon moral representation; and besides, this is an agreement between two

persons claiming under this will, in direct fraud of the testator's intention—a legal fraud, but still in its nature such, that the claim made upon the effect of such transaction should leave nothing in doubt. March 5. 1823.

Mr. Warren.—I was upon this point, whether such an action could be maintained. There is a case which has never been overruled in Pere Williams:—Two agreed to divide the property by a will. I am aware that case has been doubted, but it has never been overruled.

LORD CHANCELLOR.—There is a case where two persons agreed, that if a testator left unto one of them the whole of his property, and which the testator did, meaning the other should have none, they would divide it. In that case of Pere Williams, the agreement was held to be a good agreement, but in subsequent cases it has been stated that the Court would not accede to that doctrine. Suppose this had been an agreement free from all observation, you might have gone into the Court of Session; instead of which, the Court of Session proceeds upon this as a forfeiture—as an unsanctionable breach of the testator's will, and in consequence shifting the property of the testator's estate.

Mr. Warren.—Upon that I should say, that it was for the appellant, if he chose, not to take advantage of it, by allowing a forfeiture to be made in the way in which it appears to have been made, and to content himself by taking such portion as he was allowed to take.

LORD CHANCELLOR.—You were in too great a hurry to be married. You were in so great a hurry, that you got married before it was possible you could know what had been proposed by persons who were called his attorneys. That is not the whole of this transaction. After this takes place, a suit is immediately instituted to make a forfeiture. The appellant could not have known of the suit, or the decree of forfeiture. Then you state nothing in your summons of subsequent approbation, though you talk about it. The next question is, whether that amounts to a legal obligation to repel fraud?

Mr. Warren.—Your Lordships know the summonses in Scotland are not drawn so strictly as pleadings in this country.

LORD CHANCELLOR.—The question is, whether you can enforce it?

Mr. Warren.—That is supposing it to be an objection which the Court must take, it not having been taken by the defender below.

Mr. Attorney-General.—I take the objection, and so I opened it.

March 5. 1823. *Mr. Warren.*—I am talking of the forfeiture—not that to which my learned friend alludes. It is a different question whether the contract could be enforced: it is one thing to know whether you would allow an action to be brought in consequence of the forfeiture.

Lord Chancellor.—There is another way of putting it. Take your summons from the beginning to the end, it contains no allegation of subsequent approbation, except that this gentleman is in possession of the estate by virtue of these transactions. There is no letter written to that effect. But because he takes possession of the estate which has been forfeited, would that ratify the acts of his attorneys, arising out of a marriage to which he was no party? Then comes this question: If you have not alleged subsequent approbation, independent of his taking possession, whether the summons contains any cause of action whatever? But if the summons contains no cause of action, there can be no judgment. If, then, the only cause of action which is laid in the summons is, that this person, in consequence of this agreement and transaction, took possession of the estate—if they have produced a decreet of forfeiture in his favour, and he was not a party to these transactions previously—what was there to hinder him taking possession of the estate? He has a right to say, they acted as my attorneys, but for this purpose they were not my attorneys. This young gentleman has married, and here has been a decreet of forfeiture. I was no party to the marriage; and the attorneys had no authority from me to sanction the marriage; and I will take possession. Here is a judgment in my favour.

Mr. Attorney-General.—It is stated that it was by virtue of the decreet he took possession.

Lord Chancellor.—That is exactly what I state.

Mr. Sugden.—How could it be otherwise?

Mr. Warren.—There is certainly no allegation of subsequent approbation upon the face of the summons. That cannot be denied; but that did not appear to be an objection in the Court below, either to the Judges or to the counsel.

The House of Lords 'ordered and adjudged that the interlo-'cutors complained of in the said appeal be, and the same are 'hereby reversed.'

Lord Chancellor.—My Lords, there is a very singular case which was before your Lordships a few days ago, in which Thomas Graham, Esq. of Kinross in the county of Kinross, is appellant, and James Graham, the illegitimate son of the late George Graham, Esq. of Kinross, is respondent. This was an action brought by the respondent to have paid to him,

as the son of the late George Graham, the sum of £15,000; and that demand arose out of the following circumstances: A Mr. George Graham, since deceased, was the unlimited proprietor of the estate of Kinross in Kinross-shire. Mr. James Graham, the respondent, was his natural son. He had formed an attachment to Miss Muter of Annfield, from which his father apprehended that a marriage might follow. Of this attachment the father disapproved, and he intimated his unalterable prohibition of such a connexion; and in order to prevent it, on the 27th of July 1801 he executed a trust-disposition and settlement, by which he conveyed his whole estates and effects, heritable and moveable, in favour of his trustees, Thomas Graham the elder, who was a gentleman at that time in India in the service of the East India Company,—Colonel Alexander Park,—Robert Graham, now Moir, a physician in Stirling,—John Anstruther of Arditt, advocate,—John Græme, writer to the signet; and John M'Glashan, writer in Edinburgh,—and the acceptors, and survivors or survivor of the acceptors; 'declaring always, that these presents are 'granted by me in trust only for the use and behoof of myself during 'my own lifetime, and at my death, in the event specially after men-'tioned, only for the use and behoof of James Graham'—that is, his natural son—'my only son in life procreated betwixt me' and a lady whom he mentions, 'and the heirs male or female that may be lawfully pro-'created of my own body; whom failing, the said Thomas Graham, my 'brother consanguinean'—that is, the gentleman who is the appellant, 'and 'the heirs lawfully procreated of his body.' Then there follows this:—'That whereas the said James Graham, my son, has for this some time 'past formed or threatened to form a matrimonial connexion with Miss 'Muter, daughter of Mr. Muter of Annfield, much contrary to my wishes 'or intention; and that it is my fixed determination, if he either already 'has formed or shall hereafter form such connexion with that lady, or 'with any other lady except Miss Anna Maria Graham, eldest daughter 'of the said Thomas Graham, my brother consanguinean, without my 'consent, or the consent of the majority of my trustees surviving and ac-'cepting at the time, that the said James Graham shall take nothing 'under the present settlement, he being thereby in such event expressly 'excluded and debarred from any share of my said estates, real and per-'sonal: Therefore the said trustees shall only denude in favour of the said 'James Graham, my son, in the event of his having married, excepting 'as said is, with my consent signified in any way, or marrying with the 'consent of a majority of my trustees surviving and accepting at the time, 'previously had and obtained in writing, and no otherways: And in the 'event of his dying unmarried, or marrying without consent as aforesaid, '(except as said is,) the trustees shall, immediately after either of these 'events happening, denude of my foresaid lands and whole other estates, 'real and personal, in favour of the next person appointed to take under 'the substitution before set down, who shall be at liberty to enter into 'the possession of the said landed and personal estate, in the same way 'as if the said James Graham had never been mentioned in this deed,

March 5. 1823.

March 5, 1823. 'he and the heirs of his body procreated of any marriage without consent as aforesaid being hereby totally excluded from taking anything in 'virtue of this deed, excepting such payments, by way of a reasonable 'annuity, which my said trustees are to be judges of, as he may have 'actually received previous to the marriage.'

My Lords, George Graham, the author of this settlement, died on the 18th of December 1801, at which time the respondent had made an offer to marry Miss Muter, which, it is stated, he could not in honour withdraw.

During this period the appellant was in India, and after his father's death, the respondent James Graham endeavoured to obtain the consent of the trustees to his connexion with Miss Muter, inasmuch as he conceived, that if he could obtain their consent, he would not forfeit the estate. The trustees, however, thinking themselves bound to attend to the wishes of the testator, refused to give their concurrence. In consequence of this, the appellant having certain attorneys in London, namely, Mr. George Templar, Mr. Nathaniel Middleton, Mr. Richard Johnston, and Major John Hume, applications appear to have been made to those attorneys of the appellant, and transactions to have taken place between the respondent and those attorneys; with respect to the entering into which transactions, and the final agreement which was the result of them, it appears to me to be perfectly clear that those attorneys had no authority whatever to enter into that agreement, which by its own force could bind the appellant not to take advantage of the forfeiture, if the respondent committed one. However, my Lords, it appeared that the respondent set about making a compromise with the appellant's attorneys, to secure to himself one half of the value of his father's property; and he wrote to those attorneys, who were unauthorized, as it appears to me, for this particular purpose, a letter, dated 7th September 1802—[His Lordship then read the letter, see ante, p. 367.]—The attorneys of the appellant, as the Cases upon your Lordships' table state, 'were clear 'that two things should be excluded from the valuation;' and then follows the statement which raises the real question in this cause, 'that 'there should be excluded from the valuation, as being subjects which 'no way augmented the value of the estate, the house of Kinross and the 'political interest attached to the estate.' The Cases then proceed to state why that house ought not to be made the subject of valuation, and why the political interest should not be made the subject of valuation. I need not trouble your Lordships with stating at length that which has been so often stated—the nature and effect of these letters; but, after a good deal of correspondence, in which there are expressions which are made on both sides the subject of much discussion, Mr. Keith, to whom the value of this property had been referred, having died, and Mr. Selkrig having been nominated by Mr. Adam in his room, a report was made by Mr. Selkrig, of which there is an abstract in the papers, followed by remarks which relate to the mansion-house at Kinross, and the political interest arising from the qualifications, and the eventual benefit to be de-

rived from that property. I ought indeed to mention the fifth article which is excluded—'the casualties or compositions payable upon the entries of heirs and singular successors of vassals on the estates.' March 5. 1823.

On considering that report, the following award was pronounced by Mr. Adam:—'I perfectly approve of the principles on which Mr. Selkrig 'has estimated this property, and make the division according to this valuation; and I decide, according to the powers vested in me, that they 'do make the division accordingly; and I do not consider that any of 'the articles stated in the remarks should be allowed to constitute any 'part of the value.' Some of the articles mentioned, your Lordships observe, are the mansion-house of Kinross, and this thing called political interest. 'I make one exception, however, to this generality. I consider 'that the avenue and green of Kinross house should be valued as grass, 'and not for tillage. Subject to this deduction, my award is, that the value 'put by Mr. Selkrig be the value on which the parties are to transact.'

My Lords, a great deal of correspondence follows after this, which seems to close, or nearly close, with a letter which strikes me with being of great importance in this cause. It is a letter dated the 26th of March 1806, which is addressed, 'To the Attorneys of Thomas Graham, Esq.' and is in these words:—'Gentlemen—As the accounts between my uncle, 'Thomas Graham, Esq. and myself, so far as respects the heritable pro'perty of my late father, George Graham, Esq. of Kinross, are now finally 'settled, and mutual discharges ready to be granted by you, as my uncle's 'attorneys and myself; and as it appears to be your wish to have some 'information respecting my ideas of the points reserved in the submission 'to Mr. Adam—namely, the value of the house of Kinross, and the poli'tical interest of the estate,—I have no hesitation in declaring that I have 'no legal claim on my uncle, Thomas Graham, Esq. for either of these 'objects; but that, in terms of my agreement with my uncle's former at'torneys, they are to be referred entirely to my uncle himself.'

My Lords, I observe in passing, that there are various missives between these parties, up to this date, which have various expressions and passages in them, to which criticism may impute different meanings. But the real question, I apprehend, here is, what the parties meant? And I know of no better way of considering this, than by looking at the clear expressions in which the party states what is his own view upon the subject.

My Lords, it is only necessary to mention to your Lordships, that, excluding these subjects, the attorneys did agree—certainly without authority, but nevertheless what they did agree to might afterwards be sanctioned by the party interested—they did agree to a value being set upon those other subjects and matters in discussion in the transaction, and to the appellant receiving a moiety of the value. I do not take notice of the circumstance of their want of authority, except so far as that want of authority goes to matters to which the appellant did not agree.

My Lords, as soon as the agreement, so far as understood between the parties, had been made—but, though so far understood, there is an express letter by which the respondent undertakes to indemnify the trustees,

March 5. 1823. in case the appellant should afterwards call upon them in consequence of the forfeiture about to be incurred—Mr. Graham, the respondent, married the lady long before it was possible that a communication could be received from India by the appellant, and thereby incurred the forfeiture; and having incurred that forfeiture, the appellant appears to have heard of the fact of the marriage some six months, I think, after the agreement had been entered into. But it was quite impossible that at that time he could have heard there had been a decree of forfeiture in the Court of Session; for the parties applied to the Court of Session, and stating this forfeiture, they called for a declaration of the forfeiture; and the Court proceeded upon this as a bonâ fide transaction, and on the respondent having incurred a forfeiture. The Court, to carry into effect the will of this testator, if I may describe him as such, did (and they could do no otherwise) declare this a forfeiture, and that the estate belonged to the appellant.

My Lords, the appellant afterwards came to England; and, for nine years after his return to England, no demand of the sort made in the suit which I am about to mention was made by the respondent—to be allowed to participate in the value of the house at Kinross, and what is called the political interest. But, at the end of nine years, an action was raised by a summons, on which some observations have been made in the hearing, but on which I do not mean to trouble your Lordships; for, in my view of the case, it ought to be decided entirely upon the evidence, which sets forth the demand of the respondent himself, that he had no legal claim whatever to participate in the value of those subjects. I will however just remark, that the summons states the gentlemen in England to be attorneys of the appellant, which they certainly were, but not attorneys authorized for this purpose at all; and states the decree to have been obtained from the Court of Session, as a decree that was due upon an acknowledged forfeiture, without one single syllable stated to the Court as to the agreement under which this forfeiture had been made—an agreement obviously entered into to defeat the disposition of the testator. It simply states, without entering into particulars, that this gentleman, the appellant, entered to possession by virtue of that decree; and then it prays that those matters may be made the subject of valuation—I mean the political interest and the house at Kinross, the respondent himself putting a value upon them of £15,000.

My Lords, the correspondence that was referred to for the information of the Court of Session, is stated in different parts of the papers; and I take leave to observe in this place, that we are often extremely misled by the summons, if we do not bear precisely in mind the nature of these summonses. In our part of the island, where the general issue is pleaded, you give in evidence any thing which can be considered as evidence in defence; but if you are proceeding rather more as the Court of Session proceeds than in our Common Law Courts—that is, as a Court of Equity—you must in your bill in Equity, (which is analogous to a summons in the Court of Session,) if you mean to take up the circumstances, state a great

number of circumstances which you are left in these cases to find out, not from the record, or that part of it called the summons, but from allegations and admissions here and there dispersed through a variety of papers. March 5. 1823.

My Lords, I pass over the nature of this suit, as it respects the circumstances, with saying no more upon it than this, that where a suit is brought for the purpose of carrying into effect such a claim as that which is made on the part of the respondent, (in this case the pursuer in the Court of Session,) one thing, I think, one may venture safely to state, that, considering the nature of the suit, and the nature of the questions that arise in it, it is absolutely incumbent upon such a pursuer to leave no doubt whatever with respect to what were the facts of the case, and what was the legal meaning of the agreement. In the first place, this is a suit proceeding on a contrivance to destroy the disposition of the testator entered into between the two objects of his bounty;—in the next place, it is founded on a decree which the Court of Session had been called upon to make, for the purpose, apparently, of carrying into effect that disposition, but without its being intimated to the Court of Session that the very purpose for which they were applied to, was to defeat the very object which was the prayer of the application;—and, in the last place, whatever may be said upon the subject, it may be stated at least as a very delicate sort of proceeding, suing in a Court of Justice, to carry into effect an agreement for the value of political interest. I do not state these objections to the proceedings as decisive; but I think they call upon your Lordships to see that the party clearly makes out his case.

The suit proceeded upon the ground, that the appellant was bound by agreement to part with the house of Kinross and the political interest upon certain terms:—that he had no option whether the political interest and the mansion-house of Kinross should or should not be subjects of valuation; but that it was left to himself entirely to say what the value should be, it being nevertheless incumbent on him to permit a valuation to be made; and then the Court of Session say, according to cases which have been determined, that in as much as he would put no valuation upon these subjects, they, the Court of Session, will take upon themselves the execution of that duty; that as he would not put a value on subjects of which he was bound to permit a valuation, the Court of Session must put that value—and the respondent professing, that if any thing like a reasonable value had been put upon the subjects, he would have been content. For the purpose of this cause, it does not appear to me at all necessary to enter upon a discussion of that view of the case; because the way in which I look at this question is this—I first of all say that the respondent, who is here the pursuer, was bound, in a case of this nature, to make out facts that left no doubt whatever as to the matter of fact upon the mind of the Court;—in the next place, that those attorneys had no right whatever to bind the respondent;—in the third place, that it comes to this, How far has the appellant adopted or not adopted their acts? The appellant contends that he was (and nobody can deny that he was) in circumstances in which he might have said (and indeed the respondent admits it by giving an in-

March 5. 1823. demnity which the supposed attorneys in this country called for,) that the appellant was under no obligation whatever to concur in such an agreement as this; and it is a fact indisputable, that the decree of forfeiture had actually passed before he could hear of the matter. He might nevertheless bind himself, though it is difficult to say what consideration he could have for binding himself under such circumstances. In the letters which passed both before and after, as I before observed, there are expressions which may be construed, some of them as importing that he was to set a value upon the premises, and that that value the respondant was to permit. Others of those expressions import that he was, if he thought proper, to make them the subject of valuation: or, in other words, that this young gentleman meant to refer to his honour and his good pleasure whether these matters should or not be the subject of valuation. Then, my Lords, is it not a much safer thing for your Lordships to proceed upon the construction this party has himself put upon this correspondence, than upon the construction put by counsel at your Lordships' Bar? Look at the facts. The fact is, that the appellant was in England nine years, without his making any such claim,—and that in 1806 he expressly said, I have no legal claim upon my uncle. If he had no legal claim upon his uncle, the expression imports that his uncle was under no legal obligation to permit any valuation to be made of those subjects. Therefore it does seem to me, that, upon the effect of the evidence taken altogether, without entering into any very nice questions, these interlocutors of the Court of Session cannot be supported.

My Lords, I can easily conceive that this is a case in which this young gentleman, having engaged his heart to this young lady, and feeling it a matter of honour to marry her, may expect some exercise of feeling on his behalf. Persons in judicial situations—perhaps the older we are, the more we think about that—may feel very strongly in favour of the demand of this young man. But that will not do; because, in Courts of Justice we have no right to enforce by rules of law such considerations. Upon the whole, I think it my duty humbly to advise your Lordships to reverse this judgment.

Appellant's Authorities.—(6.)—2. St. 1. 25; 2. Ersk. 1. 25; Miln, July 19. 1715, (1759); Leslie, Feb. 9. 1765, (1761); Smith, Feb. 6. 1810, (F. C.); Ramsay, Jan. 10. 1673, (2925); Nesbit, July 10. 1707, (1769); Elliot, Jan. 21. 1767, (850.)

LEAKE,—SPOTTISWOODE and ROBERTSON,—Solicitors.

(*Ap. Ca. No.* 3.)

WILLIAM STIRLING and SONS, Appellants.—*Gifford—Clerk—Skene—Gillies.* No. 54.
JOHN DUNCAN Junior and COMPANY, Respondents.—*Moncreiff—Wilson.*

Sale—Lien—Mercantile Agent.—A mercantile agent having sold goods and taken the purchaser's bill, which he guaranteed and indorsed to the owner of the goods; and the purchaser having become bankrupt, and the owner having accepted of a composition on the bill, and delivered it up—Held, (reversing the judgment of the Court of Session,) that the agent was not entitled to withhold delivery of the goods from the purchaser, till relieved of the effect of his guarantee.

March 5. 1823.
1ST DIVISION.
Lord Gillies.

PATRICK HODGE, merchant in Leith, consigned to John Duncan junior and Company, mercantile agents in Glasgow, a quantity of madder in casks for sale. On the 5th of December 1815 Duncan and Company sold two casks to Stirling and Sons, merchants in Glasgow, the invoice of which expressed that they were bought of 'Patrick Hodge per John Duncan junior and 'Company;' and on the 23d they again sold to Stirling and Sons 10 casks more, rendering the invoice in their own name; but it was admitted that Stirling and Sons knew that the whole of the madder belonged to Hodge. Duncan and Company having intimated these sales to Hodge, he, on the 25th, desired them to take Stirling and Sons' bill for the price, and to guarantee its payment. Accordingly, on the 29th, Stirling and Sons granted their bill for the price, being £528: 17: 9, to Duncan and Company, payable at six months date. In the course of January 1816, Duncan and Company wrote to Hodge that they would guarantee the bill, which they thereupon indorsed to him. After four casks had been delivered, Stirling and Sons became bankrupt, and their estates were sequestrated under the bankrupt act. Duncan and Company thereupon refused to deliver any more of the madder.

After the bill fell due, Hodge claimed and ranked on the estate of Stirling and Sons for the amount, and deponed that he held no other security except the bill itself. Stirling and Sons having settled with their creditors for a composition of five shillings in the pound, to which Hodge acceded, the amount of it was paid to him, and he thereupon delivered up the bill. He afterwards recovered the balance from Duncan and Company under their guarantee.

Stirling and Sons, being thus discharged, demanded the remaining casks of the madder from Duncan and Company; but they having refused to deliver it until they were indemnified for the sum which they had paid to Hodge, Stirling and Sons pre-

March 5. 1823. sented a petition to the Magistrates of Glasgow, concluding for delivery, or for payment of £500 as the value of the madder.

In defence against this action, Duncan and Company maintained,—

1. That having sold the goods, acting under a del credere commission, they were substantially the proprietors of them, and as such were not obliged to deliver them till the full price was paid.

2. That at all events, and supposing they were to be regarded as agents, still, as they had interposed their guarantee, and made advances in consequence of it, and in reliance on the security of the goods, they were entitled to retain them till they were indemnified: And,—

3. That as they truly stood in the situation of cautioners for Stirling and Sons, and as the sale would not have been effected unless they had pledged their credit on their behalf, they had a right to withhold delivery till they should be relieved of the effects of their cautionary obligation.

To this it was answered,—

1. That the goods were sold, not as the property of Duncan and Company, but as that of Hodge: that by ranking on the estate of Stirling and Sons for the full amount of the price, drawing the composition, and delivering up the bill, Hodge had received payment of the price, and had discharged all claim against Stirling and Sons, who consequently were entitled to delivery of the goods.

2. That although, in a question between a principal and his agent, (whether acting del credere or otherwise,) the latter was entitled to retention against the former for advances on his behalf, yet no such rule existed as between the agent and a purchaser: And,—

3. That Duncan and Company had not been required to interpose as cautioners for Stirling and Sons; and, in point of fact, the sale was completed before they had agreed to guarantee the bill.

The Magistrates found 'it sufficiently established that the 'defenders guaranteed the price of the madders in question to 'their constituent Patrick Hodge; but that, as guarantees, the 'defenders were in no other or better situation than the said 'Patrick Hodge:—that in place of ranking on the sequestrated 'estate of the pursuers for the full amount of the price of the 'said madders, as has been done by the said Patrick Hodge, he 'ought either to have got the said madders sold under judicial 'authority, so as in that way to have ascertained the deficiency,

'if any, that would arise, or to have valued them as a security 'under the provisions of the bankrupt statute, and then to have 'ranked for the balance or deficiency so ascertained, leaving, as a 'charge against the defenders under their guarantee, any balance 'which might still remain due to the said Patrick Hodge, after 'deducting the price got, or value put upon the said madders, 'and the composition on the sum to be ranked for:—that the 'settlement of the said Patrick Hodge with the pursuers must 'be altered accordingly, and for that purpose it is necessary to 'call the said Patrick Hodge as a party to this action; and 'accordingly granted diligence at the instance of the defenders 'for citing the said Patrick Hodge.' March 5. 1823.

Against this interlocutor both parties reclaimed, and the Magistrates then pronounced this judgment:—'In the first place, 'find it not distinctly ascertained whether the defenders sold the 'pursuers the madders in question in their own name as the 'ostensible owners thereof, or as consignees or agents for the ac-'tual owner, Patrick Hodge; but of new find it sufficiently 'established that the defenders sold the said goods as consignees 'or agents in possession thereof under a del credere commission; 'and finds that, in the said circumstances, the defenders had not 'only a right of retention or lien against the said Patrick Hodge, 'the principal and consignee of the goods, in security and sa-'tisfaction of their advances or engagements on account of the 'goods, but were also entitled to be considered and held as 'owners of the goods, as between themselves and the pursuers, 'the vendees, to the extent at least of retaining possession, or 'withholding delivery, until they had received payment of the 'price which they had guaranteed, or were otherwise repaid 'their advances, or relieved of their engagements, on account 'of the goods; (see in illustration the opinions of the Judges in 'the case of Houghton *v.* Matthews, 29th June 1803, Bos. 'and Pull. C. P. Rep. Vol. III. p. 485.) In the second place, 'find that as no delivery whatever, not even constructive de-'livery, of the casks of madder now in dispute, had taken place 'prior to the date of the bankruptcy of the pursuers, the de-'fenders were not reduced to the necessity of stopping in trans-'itu, and of voiding the contract; but were entitled, upon the 'common principles of mutual contract, to retain the madders 'still undelivered, and in their complete possession, until they ob-'tained full payment of the price, and, in the event of their not 'obtaining full payment of the price, to dispose of the goods by 'judicial sale or otherwise, habili modo, and to claim damages, 'or to rank for the balance of the stipulated price upon the bank-

March 5. 1823. 'rupt estate of the pursuers. In the third place, find that the 'act of the said Patrick Hodge, in taking from the pursuers a 'composition of five shillings per pound upon the bill which the 'pursuers had granted for the price of the whole madders sold 'them by the defenders, and which the defenders had indorsed 'to Hodge, although it indirectly and by implication confirmed 'and homologated the sale of the madder to the pursuers, so far 'as he still retained an interest therein, was not relevant in law, 'though done with their knowledge, to deprive the defenders of 'the right competent to them, as agent-venders under a del credere 'commission, and considered as owners of the goods, as between 'themselves and the pursuers, the vendees, to retain the goods 'still in their possession, until repaid the advances made by them 'to Hodge on account of the said goods. In the fourth place, 'find that in the circumstances, and upon the grounds before 'mentioned, the defenders are still entitled to retain the casks of 'madder remaining in their possession, until they receive pay-'ment of the balance of the price of the whole madders still due, 'or be repaid their advances, or relieved of their engagements to 'Hodge on account of the said goods; reserving to the pursuers 'any claim they may have against Hodge on the ground of his 'having acceded to their composition-contract, or otherwise; and, 'before further judgment, appoint the pursuers to state in a 'minute what they offer to do upon the said footing, and whether 'they consent to the sale of the madders in dispute in the mean 'time.'

Stirling and Sons again reclaimed, and presented a petition praying for an order to have the madders sold, and the price consigned under authority of the Court, in consequence of which the Magistrates granted interim interdict against Duncan and Company selling them for their own behoof; but thereafter, on advising both processes, they adhered to their last interlocutor, and further found, 'That, to all appearance, the price of the 'madders still in possession of the defenders will not be sufficient 'to relieve them of their cautionary engagement to Patrick 'Hodge under the del credere commission, and accordingly re-'cal the interdict granted in the said incidental application on 'the 12th of February last; reserving to the defenders to exercise 'the right competent to them of disposing of the said madders 'in relief of the obligations undertaken, or in repayment of the 'advances made by them on the faith of the said goods, upon the 'principle recognised in the case of Broughton against Stewart, 'Primrose, and Company, 17th of December 1814. But, before 'further judgment, and for the purpose of ascertaining whether

'any balance of the price of the said madders may remain after 'relieving the defenders of their obligation of guarantee, ap- 'point the defenders to report the sale as soon as it is effected 'by them.' March 5. 1823.

The madders having been thereupon sold, and Duncan and Company having claimed credit for their del credere commission, the Magistrates found, 'That the defenders did not exceed their 'powers as agents who had made advances, or come under en- 'gagements in selling the madders in question at the ordinary 'credit of the Glasgow market, and find them entitled to the 'del credere commission charged by them: find it unnecessary 'to determine whether the defenders' right of retention covers 'any extraneous claims not arising out of the particular transac- 'tion in question: find the proceeds of the sales of the said mad- 'ders are scarcely sufficient to relieve the defenders of the en- 'gagements undertaken by them on the faith of the said goods: 'therefore assoilzie the defenders, and decern; and remit to the 'auditor to tax the defenders' expenses.'

Against these judgments Stirling and Sons complained by advocation; but the Lord Ordinary repelled the reasons, and remitted simpliciter; and the Court, on the 4th of February 1819, adhered, and decerned against Stirling and Sons for £63. 10s. of expenses.*

Stirling and Sons having appealed, the House of Lords 'ordered 'and adjudged, that the said interlocutors complained of in the 'said appeal be, and the same are hereby reversed.'

The Lord Chancellor observed, that the interlocutors of the Courts below proceeded upon an entire mistake in point of fact, because it was admitted on all hands that the guarantee had taken place subsequent to the time when the sale had been completed. The sale was made by the respondents as agents of Hodge, and the price was included in the appellants' bill which was indorsed to Hodge, the owner of the goods, who had taken a composition, and delivered up the bill. The price was therefore paid, and it was impossible to maintain that the respondents had any lien on the goods. If the cause had been tried at Guildhall, it could not have lasted a moment.

Appellants' Authorities.—2. Esp. 557; 2. Roll, 79; 54. Geo. III. c. 137. sect. 59.
Respondents' Authorities.—1. Term Rep. 112; 7. Term Rep. 359.

J. Campbell,—J. Chalmer,—Solicitors.

(*Ap. Ca. No.* 4.)

* Not reported.

No. 55. Miss JANE FERGUSON, and ROBERT FERGUSON, Esq. Appellants.—*Clerk—C. Ross—Moncreiff—Hope.*

HUGH ANDREW JOHNSTONE MUNRO, Respondent.—*Warren—Mackenzie.*

Clause, Construction of.—A party having conveyed to trustees his estate, to be made over to particular heirs, in terms of a relative deed of entail, and having also conveyed all the estates and effects he might subsequently acquire; and having thereafter purchased an estate, which, by the letters exchanged at the time, was to be disponed to himself and his heirs generally; but having afterwards taken a minute of sale in favour of himself and the heirs of entail; and the Court of Session having held that the heir of entail, and not the heir at law, had right to the new estate, the House of Lords, of consent, remitted the case to the Court of Session.

March 5. 1823.

2D DIVISION. Lords Meadowbank and Pitmilly.

IN 1798 the late Sir Hector Munro executed an entail of his estate of Novar, and at the same time a relative trust-deed of settlement narrating the entail, and conveying to Mr. Coutts and others, as trustees, his whole estates, including that of Novar, and his moveable effects, for various purposes. Among these it was declared that the trust should continue till the burdens on the estate of Novar were cleared off, when the heir of tailzie, if then of age, should be put in possession. After specially conveying that estate for behoof of the heir of entail, the deed contained a general conveyance to the trustees of 'all and sundry other lands, 'heritages, tenements, annual rents, heritable bonds, adjudica-'tions, and other heritages whatsoever, presently belonging to 'me, or that shall pertain and belong to me at the time of my 'death, and all and sundry debts and sums of money, &c., to-'gether with the whole vouchers, documents, and instructions of 'my said real and personal estate, and all that has followed, or is 'competent to follow on the same.' He also appointed the trustees to make over the residue of his estates to the late Mrs. Ferguson and others. These deeds he placed in the hands of his banker, Mr. Coutts, in London.

In October 1805 he wrote to his agent, Mr. M'Intosh, the following letter:—'As I do not find by your letter that it is certain 'you will be here, I send you the codicil which I wish to be made 'to my last will and testament. The reason for my wishing as 'much land as possible to be purchased is, that the estate, I find, 'I can now leave is not sufficient to let the proprietor live as he 'should do, and keep up the place and improvements. And as 'to the alterations in the trustees, my worthy friend, Provost 'M'Intosh, is now of such an advanced age, he would not long 'be one; and Mr. John Ogilvie has enough of his own affairs to 'mind, and could not attend much to mine.'

The paper alluded to, and enclosed in the above letter, was as follows:—'Novar-house, 21st October 1805.—I wish a codicil 'to be made to my last will and testament in the following man- 'ner: All the money I directed to be divided in different pro- 'portions to such and such persons by name, after my debts were 'paid, and my bequests &c. discharged; that is to say, whatever 'part of my personal estate was unappropriated, including what- 'ever I might be entitled to receive from the Nabob of Arcot's 'debt to me, I now revoke, and make null and void by this codi- 'cil; and instead of applying such monies as above stated, it is 'my will and pleasure, and I now direct, that what remains of 'my personal estate, together with the patrimony or portion I 'directed after my death to be given to my natural son Alexan- 'der Munro, who died in November 1804 at Bombay, shall be 'laid out by my trustees in the purchase of lands as contiguous 'to any of my estates of Novar, Culrain, or Muirton as possible, 'and entailed with the rest of my landed property six months 'after the purchase is made, and to be immediately afterwards 'put upon record: And if I have given as a patrimony or por- 'tion, after my death, to my natural son Hugh Munro, more than '£10,000 sterling money, I revoke and recal all the rest of the 'money, if any more is given to him in my last will and settle- 'ment, and direct it to be laid out in the purchase of lands with 'the rest of my unappropriated personal estate, as before men- 'tioned, and to be entailed and put upon the record in the same 'manner with the other purchases to be made. It is also my will 'and pleasure that the following gentlemen shall be my trustees, 'and I desire that such as were formerly named by me, and who 'are not included in the following list, shall be left out. Those 'now named by me are Thomas Coutts, Esq. banker in the 'Strand, Edmund Antrobus, Esq., Coutts Trotter, Esq., Ed- 'ward Marjoribanks, Esq., partners of the banking-house of 'Thomas Coutts, Esq., and Alexander Brodie, Esq. of Arnhall; 'and that the directions I gave to my former trustees may be 'followed by my present ones in all respects, except so far as this 'codicil may make any alteration necessary.' March 5. 1823.

A good deal of correspondence ensued between him and his agent relative to the above instructions, which were never put into the form of a codicil, as proposed. In November of the same year, Sir Hector agreed to purchase the estate of Culcairn from the proprietor, Mr. Munro; and accordingly, on the 12th, they exchanged the following letters, both written at Novar-house. The letter by Mr. Munro was in these terms:—'In consequence 'of our conversation of this date, I hereby sell and dispone to

March 5. 1823. ‘ you and your heirs all and whole my lands and property lying ‘ within the parish of Alness, as well highlands as lowlands, &c.; ‘ and I oblige myself immediately to execute a regular disposition ‘ of the said lands and pertinents, (reserving always to me so much ‘ of the superiority as will, with the superiority of my lands and ‘ estate of Obsdale in the parish of Rosekeen, create two votes, ‘ being £800,) containing all the ordinary clauses; and hereby ‘ agree that our joint agents at Edinburgh be immediately in- ‘ structed to draw out the proper deeds, and make up a progress ‘ to the said lands, and to transmit the whole for my subscription.’

The letter by Sir Hector was thus expressed :—‘ I am favoured ‘ with your letter of this date, making offer of selling to me all ‘ and whole your lands and estates in the parishes of Alness and ‘ Kiltearn and county of Ross, which offer I hereby accept, and ‘ bind and oblige myself, my heirs and successors, to make pay- ‘ ment to you of the sum of £30,000 sterling, and that at and ‘ against the term of Whitsunday, or 15th day of May next, being ‘ the term of my entry to the said lands and pertinents, but longer ‘ delay to make payment of the lawful interest of said sum till ‘ payment; it being understood that you will immediately exe- ‘ cute a regular disposition of the said lands in my favour, and ‘ deliver proper titles, and a progress of the same, for which pur- ‘ pose our joint agents in Edinburgh will be employed by us.’

Thereafter, on the 4th of December, a minute of sale was executed, by which ‘ the said Duncan Munro, in consideration of ‘ the price agreed to be paid in manner under written, agrees to ‘ sell to the said Sir Hector Munro, and his heirs of entail suc- ‘ ceeding to him in the lands and estate of Novar, all and whole,’ &c.; and ‘ binds and obliges himself, and his heirs and success- ‘ ors, upon receiving payment of the price as after mentioned, to ‘ make, grant, subscribe, and deliver to the said Sir Hector Munro, ‘ and his heirs of entail succeeding to him in the said lands and ‘ estate of Novar, an ample and valid feu-disposition,’ &c.

At this time Sir Hector was on his deathbed, and died within a few days thereafter. On this event taking place, the trustees nominated in the document dated 21st October 1805 brought an action of declarator to have it found, inter alia, first, That the nomination of trustees in the original trust-deed had been recalled; and, second, That the estate of Culcairn ought to be entailed by them on the heir of entail of the estate of Novar. To this action they called the respondent, (who had right to Novar in virtue of the entail,) and the appellants, who claimed the residuary funds, including the estate of Culcairn, under the general conveyance in the trust-deed.

The leading question was, Whether the document of the 21st of October 1805 was to be held as a valid testamentary deed, and as explanatory of, and modifying the trust-deed? On this point the Court, on the 20th of January 1808, 'sustained the codicil 'libelled on, executed by Sir Hector Munro upon the 21st of 'October 1805, as explanatory of, and modifying his latter will 'and testament;' and remitted to the Lord Ordinary to proceed accordingly. The question then came to be, Whether or not the heir of entail had right to Culcairn; and if so, whether in fee-simple or otherwise? On this point Lord Meadowbank 'found, 'that though, by the trust-deed in 1798, all lands that might 'belong to Sir Hector Munro at his death were conveyed to 'the trustees, no power was granted to them, in executing or 'winding up the trust, to entail the same on the heirs of entail of 'Novar; and, on the contrary, it rather appears to the Ordinary 'that, by the import of that deed, all lands not entailed by Sir 'Hector himself were to be applied by the trustees to the pur-'poses of the trust, and so ultimately to augment the residuary 'purposes thereof: That by the codicil or testamentary docu-'ment of 21st October 1805, no provision is made as to the 'disposal of acquisitions of lands made by Sir Hector himself 'subsequent to the entail 1798; and that though the alteration 'thereof made in the residuary purpose of the trust, directing the 'application of the residuary fund in making purchases of lands 'to be entailed, indicates what Sir Hector would have ordered to 'be done with his own acquisitions, had his attention been directed 'to making provisions as to this matter, such inference is merely 'a probable conjecture of intention not even attempted to be 'executed, and can form no ground of action of implement fall-'ing within the brocard, non fecit etsi voluerit: Therefore that 'the acquisition of Culcairn must descend in fee-simple to the 'heir of entail of Novar, in terms of the simple destination in the 'minute of sale; and sustained the defences accordingly.'

March 5. 1823.

To this interlocutor the following note was attached:—'A view 'of argument occurred to the Ordinary in behalf of the heirs of 'entail, which is not mentioned in the papers, but may be consi-'dered, first, To show that the acquisition of Culcairn, being an 'act in pursuance of the codicil of October 1805, cannot be con-'sidered as the disposal of a particular subject, not to be affected 'by the general settlement of the succession; secondly, That ac-'cordingly it fell under the conveyance of acquirenda in the trust-'deed 1798, and of course, under that deed as altered by the co-'dicil 1805, formed part of the residuary fund to be laid out on 'land to be entailed. Had the minute of sale been conceived in

March 5. 1823. 'favour of heirs-general, the Ordinary would have given effect to 'this argument; but as the minute is taken directly in favour of 'heirs of entail, he found it very difficult to find that the estate 'acquired was carried by the conveyance in the trust-deed 1798 'in prejudice of those heirs, in order that it might be entailed on 'them by the power in the codicil 1805 to entail lands purchased 'by the residuary fund; and yet this difficulty sounds very like 'a subtlety, and I should be very well pleased to see it sifted. 'At the same time it is a sort of indication of intention to have 'taken the conveyance to the heirs of entail directly, that it should 'not perform the circuit of falling under the trust-deed 1798; 'and yet it is highly probable that this circumstance proceeded 'entirely from a mere incorrectness of thought in contemplating 'the result of that circuit, viz. that the lands were ultimately to 'go to the heirs of entail.'

In the mean while an appeal had been entered against the judgment of the Court sustaining the above document, in consequence of which, further procedure was stopped. Thereafter the House of Lords, on the 7th of July 1813, ordered and adjudged, 'That the said interlocutors complained of in the said appeal be, 'and the same are hereby reversed, so far as they sustain, or can 'be taken to sustain, the paper libelled on, (in the interlocutor of '20th January 1808 termed a codicil, and therein expressed to 'have been executed by Sir Hector Munro upon the 21st of October 1805,) as explanatory of, and modifying the latter will 'and testament of Sir Hector Munro: And it is further ordered, 'that, with this reversal, the cause be remitted back to the Court 'of Session in Scotland, to proceed therein as is just.' *

This judgment having been applied, and the case having been remitted to Lord Pitmilly in place of the late Lord Meadowbank, the respondent pleaded,—

1. That the general clause in the trust-deed was not sufficient to include lands afterwards acquired by Sir Hector, as it appeared from the terms of the trust-disposition that he did not contemplate any conveyance of lands, other than the entailed estate to the trustees, so that the appellants could make no claim under that clause.

2. That supposing that clause were sufficient, yet the terms of the minute of sale demonstrated that the intention of Sir Hector was, that the estate of Culcairn should not pass under this general disposition, but should go to his heirs of entail, and that effect ought to be given to that intention: And,—

* See 1. Dow, p. 437.

3. That although Sir Hector probably meant to have entailed the estate of Culcairn by adding fetters to the destination in favour of his heirs of entail, yet quod potuit et voluit non fecit; and therefore the estate must be held to have passed in fee-simple to these heirs. March 5. 1823.

On the other hand it was contended by the appellants, That in consequence of the general clause of conveyance in Sir Hector's trust-deed, the lands in question fell under the trust, and formed a part of the residue of his estate, descendible to his residuary legatees, and not to his heirs of entail in the Novar estate, or to his heir of provision in the minute of sale; and in support of this proposition they referred to the terms of the letters which had been exchanged between Sir Hector and Mr. Munro, and by which they alleged the sale was completed.

Lord Pitmilly pronounced this interlocutor:—'Finds that, by 'the trust-disposition in 1798, all lands that might belong to 'Sir Hector Munro at the time of his death were conveyed to the 'trustees for the purposes of the trust: Finds, that although 'the trust-deed does not in express terms give power to the trus-'tees to sell any of the lands falling under the trust, or to dis-'pone or make over land to the residuary legatees at the winding 'up of the trust; yet, that there being an express conveyance to 'the trustees in the trust-deed of all lands that might belong to 'Sir Hector Munro at his death, and the obligation on the trus-'tees to yield possession to the heir of entail at the termination 'of the trust being clearly limited to the lands conveyed by the 'entail, to which accordingly the trustees were to make up titles 'by charter and sasine on the deed of entail, all other lands which 'might belong to Sir Hector at his death, and of which no other 'and different destination was made by Sir Hector by a separate 'deed, must, at the winding up of the entail, have formed part 'of the residuary fund, and as such must have belonged to the 'residuary legatees: But finds, that although the trust-deed ex-'pressly conveyed to the trustees all lands that might belong to 'Sir Hector at the time of his death; and although this convey-'ance would have brought under the trust all lands which Sir 'Hector had purchased by minute of sale, or other title in his 'own favour, or in favour of himself, his heirs and successors, in 'general terms; yet that Sir Hector had it in his power, when 'purchasing any particular lands, subsequent to the date of the 'trust, to take the seller of the lands bound to convey the lands 'to particular heirs or disponees different from the trustees, and, 'by so doing, to prevent the lands purchased from falling under 'the clause of the trust-deed referred to; and finds that Sir 'Hector did so with regard to Culcairn by the minute of sale 4th

March 5. 1823. ‘ December 1805, by which he took the seller bound to sell the ‘ said lands ‘ to the said Sir Hector Munro, and his heirs of entail “ succeeding to him in the lands and estate of Novar,’ and, on re- ‘ ceiving payment of the price, ‘ to deliver to the said Sir Hector “ Munro, and his heirs of entail succeeding to him in the lands and “ estate of Novar, an ample and valid feu-disposition :’ Finds ‘ that the effect of this minute of sale was to prevent the lands of ‘ Culcairn from falling under the general conveyance to the trus- ‘ tees in the trust-deed of all lands that might belong to Sir Hec- ‘ tor at the time of his death, and to destine these lands specially ‘ by separate titles to Sir Hector and his heirs of entail; and ‘ finds, that although it is sufficiently proved by the minute and ‘ codicil of 1805, (which, though set aside as a settlement, affords ‘ evidence of Sir Hector’s intention,) as well as by the letters to ‘ his agent, that he had resolved to subject the lands of Culcairn ‘ to the fetters of his entail, and that his death only prevented ‘ this arrangement taking place, and that he never contemplated ‘ the settling of Culcairn on the heirs of entail in fee-simple; yet ‘ that these considerations cannot authorize the setting aside of ‘ the legal effect of the destination contained in the minute of ‘ sale, and the subjecting the lands of Culcairn to the clauses of ‘ the trust-deed, under which, notwithstanding the general con- ‘ veyance in the deed of all lands which should belong to him at ‘ his death, this particular purchase never fell, nor was intended ‘ by Sir Hector to fall,—he having made a special destination of ‘ these lands to other heirs by the minute of sale: Finds, on these ‘ grounds, that the lands of Culcairn belong in fee-simple to the ‘ heir of entail now in possession of the estate of Novar, Hugh ‘ Andrew Johnstone Munro; and that the rents which have fallen ‘ due since the death of his father, Alexander Munro, belong to ‘ the said Hugh Andrew Johnstone Munro; and that the rents ‘ from the death of Sir Hector to the death of Sir Alexander ‘ Munro belong to the executors of Sir Alexander; and decerns ‘ and declares accordingly.’

The appellants having reclaimed, the Court, on the 12th of May and 10th of June 1819, adhered. *

Against these judgments the appellants entered an appeal; and the House of Lords ‘ ordered, that the said cause be remitted ‘ back generally (by consent of both parties) to the Court of Ses- ‘ sion in Scotland.’

J. RICHARDSON,—SPOTTISWOODE and ROBERTSON,—Solicitors.

(*Ap. Ca. No. 5.*)

* Not reported.

Dame ANN PATERSON or ANSTRUTHER, and Lady DIANA H. CAMPBELL and Others, Appellants.—*Ross—Clerk—Hope.*
Sir W. PURVES and Others, Respondents.—*Warren—Irving.*

No. 56.

Prescription—Clause.—A party who possessed an estate under an entail, prohibiting, inter alia, any alteration of the course of succession, having, by his son's contract of marriage, bound himself to convey the estate to a different series of heirs, and under different conditions from those in the entail, agreeably to which he granted a disposition and procuratory of resignation; and, in expeding the charter of resignation, the conditions and order of succession in the entail having been introduced historically in describing the lands; but the conveyance of them being made in terms of the marriage-contract, and under the conditions 'supra script.;' and sasine having been taken accordingly, and possession enjoyed for forty years:—Held, (affirming the judgment of the Court of Session,) that the original entail was superseded, and that the charter and sasine formed the governing investiture of the estate, free from the limitations of the entail.

Mar. 10. 1823.

2D DIVISION.

Lord Pitmilly.

IN the year 1697 Patrick Lord Polwarth was created Earl of Marchmont, with a destination to his heirs-male whatsoever; and in January 1703 he executed a procuratory of resignation of his estates of Polwarth, Redbraes, Greenlaw, and others, situated in Berwickshire, in favour of himself in liferent, and Patrick Lord Polwarth, his eldest son, and a series of heirs, in fee, under the restrictions of an entail, and particularly that they should assume the arms and title of Hume of Marchmont, and should not alter the succession thereby destined. Upon this procuratory he obtained a Crown charter on the 29th of July 1704, the dispositive clause of which was thus expressed:—'Sciatis nos, &c. dedisse, 'concessisse, et disposuisse, et pro nobis nostrisque successoribus 'pro perpetuo confirmâsse, sicuti cum avisamento et consensu 'prædict. damus, concedimus, et disponimus, proq. nobis et suc- 'cessoribus nostris pro perpetuo confirmamus prædilecto nostro 'consanguineo Patricio Comiti de Marchmont, Domino Polwarth, '&c. in vitali redditu, duran. omnibus suæ vitæ diebus, et Pa- 'tricio Domino Polwarth, ejus filio legitimo natu maximo, et 'hæredibus masculis de ejus corpore legitime procreand., in feodo; 'quibus deficien., dict. Patricii Comitis de Marchmont hæredi- 'bus masculis sui maritagii cum quond. Domina Grisella Kerr, 'ejus sponsa, Comitissa de Marchmont; quibus deficien., dict. 'Patricii Comitis de Marchmont proximis legitimis hæredibus 'masculis quibuscunq.; quibus etiam deficien., suis proximis le- 'gitimis hæredibus-fœmellis, natu maxima hærede-fœmella sem- 'per excluden. reliquas ejusq. gradûs, et succedere absq. divi- 'sione; quibus etiam deficien., ejus proximis legitimis hæredi-

Mar. 10. 1823. ‘ bus et assignatis quibuscunque, hæreditarie et irredimabiliter, ‘ cum et sub expressis provisionibus et conditionibus semper sub- ‘ tus specificat.’

There then followed a description of the various lands; after which the charter bore that they were resigned in the hands of the Crown for new infeftment to the Earl in liferent, and the above heirs of tailzie in fee:—‘ Et cum et sub dict. provisionibus ‘ et conditionibus subtus specificat. viz. Proviso, sicuti tenore ‘ præsentis cartæ expresse providetur et declaratur, et sic pro- ‘ videbitur infeofamentis desuper sequen., quod dict. Patricius ‘ Dominus Polwarth, et reliqui hæredes masculi et substituti ‘ succeden. ad dict. terras et lie estate virtute talliæ supra script., ‘ astringentur, tenebuntur, et obligabuntur nominare et designare ‘ seipsos cognomine de Hume solummodo, et gerere et portare ‘ arma et tunicam armoream familiæ de Marchmont: Et etiam ‘ proviso, sicuti tenore præsentis cartæ providetur, quod si (de- ‘ ficien. hæredibus masculis) contigeret dict. heredes-fœmellas ‘ succedere ad dict. terras et lie estate virtute talliæ supra script., ‘ tunc et in eo casu dict. hæres-fœmella sic succeden. astringetur, ‘ tenebitur, et obligabitur nubere viro nobili vel generoso cogno- ‘ mini de Hume, vel qui, ejusq. hæredes quos succedere contigeret ‘ ad dict. terras et lie estate virtute talliæ supra script., dict. cog- ‘ nomen assument, et gerent et portabunt arma et tunicam armo- ‘ ream dict. familiæ de Marchmont: Et similiter proviso, sicuti ‘ tenore præsentis cartæ ulterius providetur, quod non erit lici- ‘ tum nec legitimum dict. Patricio Domino Polwarth, nec aliis ‘ hæredibus talliæ supra script., vel eorum cuilibet, quodvis ‘ factum vel actum directe vel indirecte facere ad frustran- ‘ dum, infringendum, innovandum, vel alterandum hanc præ- ‘ sentem talliam in ordine successionis, et sub provisionibus ‘ et conditionibus ejusd. supra express., aliquo modo: Et si ‘ contigeret dict. Patricium Dominum Polwarth, vel quemlibet ‘ hæredem talliæ supra specificat., deficere in exacta et punctuali ‘ præstatione conditionum supra express., vel quodlibet actum ‘ vel factum directe vel indirecte facere in contraventionem ‘ ejusd., tunc et in eo casu, et quoties evenire contigeret, contra- ‘ veniens ipso facto perdet et amittet jus ad dict. terras et lie ‘ estate, et eadem devolvent, accrescent, et pertinebunt ad proxi- ‘ mum immediatum hæredem talliæ, sub provisionibus et condi- ‘ tionibus supra express.; idque ope exceptionis, sine qualibet de- ‘ claratione, cui erit legitimum se cognosci et deserviri hæredem ‘ in speciali vel contravenienti, vel contravenientis immediato ‘ prædecessori qui obiit ultimo vestit. et sasit., et desuper obti- ‘ nere seipsos debiter intrat., infeodat., et sasit. in dict. terris et lie

'estate, sicuti congruit, sine qualibet subjectione seu obligatione pro debitis aliisque factis contravenientis, qualibet modo.' Mar. 10. 1823.

In the deed there was no prohibition against alienation, or the contracting of debt; and although there was a resolutive clause, relative to the prohibition of altering the order of succession, yet there was not an irritant one. A power was reserved to the Earl to sell the estate and contract debts; and a clause was introduced, incorporating the whole lands into a free lordship and regality, of which Greenlaw was to be the head burgh. On this charter sasine was taken on the 26th of August 1704.

Patrick Lord Polwarth, the institute, predeceased his father without issue; and on the death of the Earl he was succeeded in his honours and estates by his second son Alexander, who made up titles under the investiture 1704, by special service, as heir of provision to his eldest brother Patrick. Earl Alexander married the heiress of Campbell of Cessnock in Ayrshire, by whom he acquired in fee-simple the estates of Cessnock and Sornbeg in that county. He had a son, Hugh Lord Polwarth, who in 1731 entered into a contract of marriage with Miss Ann Western, an English lady of considerable fortune. By this contract (to which Earl Alexander was a party, and in which Charles Lord Binning, and David Mitchell of Papes in the county of Hertford, were trustees for the lady) the Earl, in consideration of the marriage, and of the payment to him of £18,000, (being part of the lady's portion,) bound and obliged himself to convey to these trustees his whole estates, both in Berwickshire and Ayrshire, 'in trust, nevertheless, and to and for the uses herein after mentioned, and to and 'for no other uses, purposes, and intents whatsoever:—that is to 'say, to the use of the said Hugh Hume Campbell, commonly 'called Lord Polwarth, and to his heirs-male lawfully begotten 'on the body of the said Ann Western, his intended wife.'—Then followed certain provisions for the lady and for younger children, and a reservation of the Earl's liferent, with other conditions not necessary to be specified.

The marriage having taken place, the Earl, in implement of the above obligation, executed, on the 21st of May 1731, a disposition and procuratory of resignation, proceeding on a narrative of the terms of the contract of marriage. The dispositive clause was thus expressed:—'Therefore wit ye us, the said Alexander 'Earl of Marchmont, (with consent of the said Charles Lord 'Binning and David Mitchell, trustees aforesaid,) for the love, 'favour, and affection which we have and bear to the said Hugh 'Lord Polwarth, our said son, and for implement and fulfilling 'of our part of the said marriage articles, and for divers and

Mar. 10. 1823. 'sundry other good causes and considerations moving us here-'unto, to have given, granted, and disponed, as, by the tenor 'hereof, (with and under the express reservations, provisions, 'and declarations under written, allenarly, and no otherwise, which 'are to be insert in the infeftment to follow hereupon,) we, with 'consent foresaid, give, grant, and dispone, heritably and irredeem-'ably, to the said Hugh Lord Polwarth, our eldest son, and his 'heirs-male of the marriage with the said Ann Western; which 'failing, to his heirs-male of any other marriage; which failing, to 'his other heirs who are to succeed to the honours and title of 'Earl of Marchmont,—all and haill,' &c. There was then inserted a description of the lands in Berwickshire and Ayrshire, which was followed by the provisions, reservations, and conditions inserted in the contract of marriage. In the procuratory of resignation he gave authority to resign the lands 'in favour 'and for new infeftments of the same to be made and granted to 'the said Hugh Lord Polwarth, and his heirs-male of the mar-'riage with the said Ann Lady Polwarth; which failing, to his 'heirs-male of any other marriage; which failing, to his other 'heirs who are to succeed to the title, honours, and dignity of 'Earl of Marchmont, heritably, in such due and competent form 'as accords, with and under the reservations, provisions, and de-'clarations before and after mentioned.' There were then again inserted the provisions, reservations, and conditions contained in the marriage-contract, and an obligation that Hugh Lord Polwarth should expede his infeftments, 'with and under all and 'every the provisions and declarations contained in this present 'right and disposition, and no otherwise.' No allusion whatever was made in this deed to the investiture 1704, under which the Earl possessed the estates in Berwickshire, and by which they were destined to a different series of heirs. This disposition was followed by a supplementary one on the 5th of March 1734, in relation to lands which had been accidentally omitted in the former one, but which was precisely in the same terms.

On the 12th of February 1736, the lands were resigned in the hands of the Crown; and an instrument of resignation was expede, bearing that the resignation proceeded 'by virtue of the procu-'ratories of resignation contained in the respective rights and 'dispositions of the said lands, lordships, and others under writ-'ten, made and granted by the said Alexander Earl of March-'mont to and in favour of Hugh Hume Campbell Lord Pol-'warth, his son, and his heirs-male of the marriage with Dame 'Ann Western Lady Polwarth; which failing, to his heirs-male 'of any other marriage; which failing, to his other heirs who were

'to succeed to the title, honours, and dignity of Earl of March- Mar. 10. 1823.
'mont, heritably and irredeemably;—the one of the said disposi-
'tions dated the 27th of May 1731, and the other of the said
'dispositions dated the 5th day of March 1734.' After de-
scribing the lands, the instrument stated, that 'which several
'lands, &c. and others above written, with the pertinents, viz. the
'said lands and barony of Redbraes, the lands and barony of
'Polwarth, the lands and barony of Greenlaw, with the advoca-
'tion, &c. were all formerly unite in ane haill free burgh of ba-
'rony, called the barony of Polwarth, conform to the charter
'above mentioned; as also the said lands and barony of Green-
'law Redpath, comprehending as said is, &c. formerly belonging
'to the said deceased Patrick Earl of Marchmont, and were by
'him and his lawful procurators duly and lawfully resigned in
'the hands of the Lords Commissioners of the Treasury and
'Exchequer of his deceased Majesty King William of blessed
'memory upon the 24th day of the month of June 1700, in fa-
'vour and for new infeftments of samen to be made and granted
'to the said umquhile Patrick Earl of Marchmont in liferent,
'and the deceased Patrick Lord Polwarth, his eldest son, his
'heirs-male, and other heirs of tailzie and provision after speci-
'fied, in fee, with and under the express provisions and conditions
'under written; as also the said lands of Rowinston, with the
'pertinents thereof, formerly pertaining to the said deceased Pa-
'trick Lord Polwarth, and were by him and his lawful procura-
'tors also duly and lawfully resigned in the hands of the Lords
'Commissioners of Treasury and Exchequer of her deceased Ma-
'jesty Queen Anne upon the 22d day of the month of January
'1708, in favour and for new infeftments of the same to be made
'and granted to the said deceased Patrick Earl of Marchmont
'in liferent, and to the said deceased Patrick Lord Polwarth,
'and the heirs-male lawfully to be procreated of his body, in fee;
'which failing, to the said deceased Patrick Earl of Marchmont
'his heirs-male of the marriage with the deceased Dame Grisel
'Kerr, his spouse, Countess of Marchmont; which failing, to the
'nearest lawful heirs-male whatsomever of the said deceased Pa-
'trick Earl of Marchmont his nearest heirs-female, the eldest heir-
'female always excluding the rest of the same degree, and suc-
'ceeding without division; which also failing, to his nearest law-
'ful heirs and assignees whomsoever, heritably and irredeemably,
'and with and under the provisions and conditions after specified,
'viz. Providing, as by the said resignation and charter granted
'thereupon it was expressly provided, and ordained to be provided
'by the infeftments following thereupon, that the deceased Pa-

Mar. 10. 1823. 'trick Lord Polwarth, and the other heirs-male and substitutes 'succeeding to the said lands and estate by virtue of the tailzie 'above written, should be holden bound and obliged to name and 'design themselves by the surname of Hume, and to carry or 'bear the ensigns or coat armorial of Marchmont: As also pro- 'viding, as by the said charter it was provided, that if (the heirs- 'male failing) it should happen the heirs-female to succeed to 'the said lands and estate by virtue of the tailzie above written, 'then and in that case the said heir-female so succeeding should 'be holden bound and obliged to marry a nobleman or gentle- 'man of the surname of Hume, or who, and his heirs that should 'happen to succeed to the said lands by virtue of the tailzie above 'mentioned, should assume the surname, and carry and bear the 'ensigns and coat armorial of the said family of Marchmont: 'And likewise providing, as by the said charter it was further 'provided, that it should not be leisome or lawful to the said de- 'ceased Patrick Lord Polwarth, nor to the other heirs of tailzie 'above written, or any of them, to do any fact or deed, directly 'or indirectly, to frustrate, infringe, innovate, or alter the said 'tailzie in the order of succession, and under the provisions and 'conditions above expressed, any manner of way whatsoever: 'And if it should happen the said Patrick Lord Polwarth, or any 'other heir of tailzie above specified, to be deficient in the exact 'and punctual observance of the conditions above set down, or to 'do any fact or deed, directly or indirectly, in contravention 'thereof, then and in that case, and as oft as the same shall hap- 'pen, the person contravening shall thereby amit and lose all 'right to the said lands and estate, and the same shall devolve, 'accresce, and pertain to the next immediate heir of tailzie under 'the provisions and conditions above expressed, and that simply 'by way of exception, without any declarator to whom it should 'be lawful to serve and cognosce themselves heirs in special, either 'to the contravener, or his immediate predecessor who died last 'vest.' There were then introduced the other clauses contained in the titles of 1704, which were followed by a resignation of the lands in Ayrshire. After this the instrument proceeded to state, that the resignation of these several lands was made 'in the hands 'of George Dalrymple, Esq. one of the Lords Barons of said Ex- 'chequer, for himself, and in name and behalf of the remanent 'Barons of Exchequer, who accepted and received the same in 'favour and for new infeftment thereof to be made and granted 'to the said Hugh Hume Campbell Lord Polwarth, and his 'heirs-male of the marriage with the said Ann Lady Polwarth; 'which failing, to his heirs-male of any other marriage; which

'failing, to his other heirs who are to succeed to the titles, honour, Mar. 10. 1823.
'and dignity of Earl of Marchmont, heritably, in such due and
'competent form as accords, with and under the reservations,
'provisions, and declarations therein and after mentioned.' The reservations and provisions contained in the contract of marriage, and no other, were then inserted.

A charter of resignation was then expede on the 12th of February 1736, the dispositive clause of which bore, that his Majesty conveyed 'dilecto nostro Hugoni Hume Campbell Do-
'mino Polwarth, filio legitimo natu maximo Alexandri Comitis
'de Marchmont, &c., et hæredibus ejus masculis maritagii cum
'Domina Ann Western Domina Polwarth; quibus deficien., hæ-
'redibus ejus masculi cujusvis alterius maritagii; quibus defi-
'cien., aliis ejus hæredibus qui honoribus et titulo Comitis de
'Marchmont succedere designantur, hæreditarie et irredimabi-
'liter, cum et sub expressis reservationibus, provisionibus, et de-
'clarationibus subscript. solummodo, et haud aliter, quæ in hac
'præsenti carta et infeofamentis desuper sequen. inseri ordinan-
'tur, totas et integras terras,' &c.

There then followed a description of the lands, and a translation of the above clauses contained in the titles 1704, specifying the limitations and prohibitions therein expressed, precisely as had been done in the instrument of resignation; after which this clause was introduced:—'Quæquidem terræ, dominium, regalitas,
'baroniæ, molendina, terræ molendinariæ, decimæ, rectoriæ et
'vicariæ, jura patronatûs, aliaq. particulariter supra specificat.,
'jacen. modo respective supra mentionat., cum omnibus suis per-
'tinen. (terris et baroniâ de Sornbeg, comprehenden. particulares
'terras, decimas, aliaq. supra mentionat., exceptis,) ad dict. Alex-
'andrum Comitem de Marchmont perprius hæreditarie perti-
'nuerunt, per illum ejusq. prædecessores de nobis nostrisque regiis
'prædecessoribus tent., et quæ per præfat. Alexandrum Comitem
'de Marchmont, ejusq. legitimos procuratores ejus nomine ad
'hunc effectum specialiter constitut. per patentes literas procura-
'toriales content. in jure et dispositione præmissorum, et concess.
'per dict. Alexandrum Comitem de Marchmont, cum consensu
'demortui Caroli Domini Binning, et Davidis Mitchell de Papes
'vicecomitatu de Hertford, Armigeri, pro dict. Anna Domina
'Polwarth, fidecommissariorum; ad et in favorem dict. Hugonis
'Domini Polwarth, ejus filii, ejusq. prædict., de data Londini
'vigesimo septimo die mensis Maii, anno Domini millesimo sep-
'tingentesimo trigesimo primo, et content. in jure et dispositione
'fact. et concess. per dict. Alexandrum Comitem de March-
'mont, cum consensu prædict.; ad et in favorem præfat. Hugo-

Mar. 10. 1823. ‘ nis Domini Polwarth, de data Londini quinto die mensis Mar-
‘ tis, anno Domini millesimo septingentesimo trigesimo quarto, in
‘ manibus dict. Dominorum Scaccarii nostri Baronum apud
‘ Edinburgum duodecimo die mensis Februarii instantis, debite
‘ et legitime resignatæ fuerunt in favorem proque hoc novo
‘ nostro earund. infeofamento præfato Hugoni Domino Polwarth,
‘ ejusque hæredibus masculis maritagii cum dict. Anna Domina
‘ Polwarth ; quibus deficien., hæredibus ejus masculis cujusvis al-
‘ terius maritagii ; quibus deficien., aliis ejus hæredibus qui titulo
‘ et dignitati Comitis de Marchmont succedere designantur, hære-
‘ ditarie et irredimabiliter, dand. et concedend. in tam debitâ et
‘ competenti formâ uti congruit, cum et sub reservationibus,
‘ provisionibus, et declarationibus in dict. dispositione content.
‘ et postea mentionat.’

The reservations and provisions here mentioned were those which were inserted in the contract of marriage. The tenendas clause bore, that the lands were to be held ‘ sub reservationibus, ‘ provisionibus, et declarationibus supra specificat. ;’ and the precept of sasine directed sasine to be given, ‘ cum et sub expressis ‘ reservationibus, provisionibus, et declarationibus supra script. ‘ solummodo, et haud aliter.’ These words, ‘ supra specificat.’ and ‘ supra script.,’ were capable of being applied to the whole provisions, conditions, &c. previously inserted in the deed, including those taken from the titles of 1704.

In virtue of this charter, sasine was taken in October, and recorded in November 1737. The instrument commenced by narrating, that the attorney of Hugh Lord Polwarth had come to the ground, ‘ habens et in suis manibus tenens quandam cartam, ‘ præceptum sasinæ sub insert. in se continen. fac. dat. et concess. ‘ sub Magno Sigillo S. D. N. Regis, præfato Hugoni Hume ‘ Campbell Domino Polwarth, et hæredibus ejus masculis mari-
‘ tagii cum Domina Anna Western Domina de Polwarth; quibus
‘ deficien., hæredibus ejus masculis cujusvis alterius maritagii ;
‘ quibus deficien., aliis ejus hæredibus qui honoribus et titulo
‘ Comitis de Marchmont succedere designantur, hæreditarie et
‘ irredimabiliter, cum et sub expressis reservationibus, provisioni-
‘ bus, et declarationibus subscript., et haud aliter, quæ in hoc
‘ præsenti infeofamento inseri ordinantur, de totis et integris ter-
‘ ris, &c., aliisque particulariter subtus specificat.’ After this there was inserted a description of the lands, and the provisions, conditions, &c. of the investiture 1704 were then introduced in the same way as had been done in the instrument and charter of resignation. The sasine then stated that the lands &c. had been resigned in the hands of the Crown, in

'favorem proq. novo earund. infeofamento præfato Hugoni 'Domino Polwarth, ejusque hæredibus masculis maritagii cum 'dicta Anna Domina Polwarth; quibus deficien., hæredibus ejus 'masculis cujusvis alterius maritagii; quibus deficien., aliis 'ejus hæredibus qui honoribus, titulo, et dignitati Comitis de 'Marchmont succedere designantur, hæreditarie, irredimabiliter, 'dand. et concedend. in tam debitâ et competenti formâ uti con-'gruit, cum et sub reservationibus, provisionibus, et declarationi-'bus in dict. dispositione content. et postea mentionat.' There then followed the reservations, provisions, and declarations contained in the contract of marriage; and sasine was given, 'cum 'et sub expressis reservationibus, provisionibus, et declarationi-'bus supra script. solummodo, et haud aliter.' Mar. 10. 1823.

In 1789 Earl Alexander died, and was succeeded by his son Hugh Lord Polwarth, now Earl of Marchmont, who continued to possess the estates, in virtue of the above charter and sasine, till 1794, when he died. He left three daughters,—Lady Ann, who was dead, but had a daughter by Sir John Paterson,—Lady Margaret, who died without issue,—and Lady Diana, who was married to Walter Scott of Harden, by whom she had children.

On the death of Hugh Earl of Marchmont, it was found that he had executed a trust-disposition and deed of settlement conveying his estates to Messrs. Wauchope and Cumming, writers to the signet, for various purposes, and, inter alia, to make them over to a series of heirs nominated in a relative deed of tailzie; —'whom failing, the heirs-male of the body 'of Lady Diana Hume Campbell, alias Scott, to be procre-'ated between her and any other husband she might happen 'to marry after the decease of Walter Scott, Esq. of Harden, 'in case she shall survive him; whom failing, any daughter or 'daughters to be procreated of the body of the said Lady Diana 'Hume Campbell, alias Scott, by any other husband than the 'said Walter Scott, in their order, and the heirs-male of their 'bodies respectively; whom failing, any other daughter or daugh-'ters yet to be procreated of my own body, and the heirs-male 'of their bodies respectively; whom failing, the heirs of the body 'of Sir Alexander Purves of Purveshall, and to the heirs-male of 'their bodies,' &c. The trustees, in consequence of this deed, expede a charter of resignation, and were infeft, and thereafter conveyed the lands to the respondent Sir William Purves, the son of Sir Alexander, and who had right under the deeds executed by Earl Hugh. On the other hand, Lady Diana and her family, and his grand-daughter Lady Paterson or Anstruther, claimed right under the investiture of 1704, by which the estates in Ber-

Mar. 10. 1823. wickshire were destined to the heirs-female of Patrick Earl of Marchmont, failing heirs-male—an event which had now occurred. They therefore brought an action of reduction and declarator, in which they concluded to have it found, first, that the investiture of 1704 was still subsisting and available, and that the charter and sasine of 1736 was made under the limitations contained in that investiture, so that they had right to succeed under the destination in these titles to heirs-female, failing heirs-male of the body of Earl Patrick; and that the trust-disposition and entail of 1794 were contrary to the prohibitions contained in these titles, and therefore unavailing;—and, second, that in the event it should be found that the charter and sasine in 1736 were inconsistent with the original tailzie in 1704, it ought to be declared that that charter and sasine were not effectual, as flowing a non habente potestatem, and therefore that effect should be given to the original investiture.

In defence, and as a title to exclude, it was maintained by Sir William Purves, and the other heirs having right under the deeds executed by Earl Hugh in 1794, that by the charter and sasine of 1736 in favour of his Lordship, the estates had been conveyed to him and the heirs therein mentioned, subject only to the reservations and provisions in his contract of marriage, and without any of the limitations imposed by the original tailzie; and that as he had possessed on that charter and sasine for more than 40 years, he had acquired an effectual prescriptive title to the lands in fee-simple.

The Lord Ordinary found, that 'by the marriage articles of 'the 1st of May 1731, Alexander Earl of Marchmont, with a 'view to the marriage of his son Hugh, then Lord Polwarth, 'with Miss Ann Western, and to the payment of £18,000 of 'the lady's fortune, became bound to convey the estate of March-'mont to trustees for behoof of the heirs-male of the marriage, 'and under certain 'reservations, provisions, and declarations' 'in favour of himself and of his son's wife, and of the younger 'children of his son's marriage, but without any other limita-'tions, and particularly without reference to the provisions and 'conditions contained in the tailzie of 1704, under which Alex-'ander Earl of Marchmont held the estate, and also without re-'ference to the nomination or substitution of heirs contained in 'that deed: That, in implement of the said marriage articles, 'Alexander Earl of Marchmont executed a disposition on the '21st May 1731, and a supplementary disposition in 1734-5, 'conveying his estate, under the same 'reservations, provisions, "and declarations' as those expressed in the marriage articles,

'in favour of himself and of Lady Polwarth, and of the younger 'children of his son's marriage, to his son, then Lord Polwarth, 'and the heirs-male of the marriage, and substituting, (though 'this was not required by the marriage articles,) in the event of 'the failure of heirs-male, the heirs-male of his son of any other 'marriage; whom failing, 'his other heirs who are to succeed "to the honours and title of Marchmont:' That an instru- 'ment of resignation having been expede on the procuratories 'contained in the dispositions 1731 and 1734-5, a charter of re- 'signation followed in 1736, on which infeftment was taken by 'Hugh then Lord Polwarth in 1737, and on which titles his 'Lordship (who in 1739 succeeded to his father, and became 'Earl of Marchmont) possessed till his death in 1794: That 'the charter 1736, and infeftment upon it, were conceived in fa- 'vour of the series of heirs above mentioned, as contained in 'the disposition 1731, and supplementary disposition 1734-5, 'and cannot be held as granted in favour of the series of heirs 'contained in the tailzie 1704: That the charter and infeft- 'ment referred to were granted under the 'reservations, provi- "sions, and conditions' in favour of Alexander Earl of March- 'mont, and of Lady Polwarth, his son's wife, and of the younger 'children of their marriage, and under no other limitations; and 'in particular that the charter 1736, and infeftment, were not 'burdened with the conditions, prohibitory and resolutive, con- 'tained in the tailzie 1704; and that although the charter 1736, 'and infeftment on it, in describing the lands and former titles 'under which the estate was held, mentions both the series of 'heirs of the entail 1704, and the 'provisions and conditions' 'contained in that deed, yet that the insertion of the nomination 'of heirs, as well as of the prohibitory and resolutive clauses of 'the tailzie, is only made in detailing the former titles, and 'that the charter 1736 is expressly taken to a particular series of 'heirs distinctly enumerated in the dispositive clause, and differ- 'ent from the series of heirs in the entail 1704, and under reserv- 'ations, provisions, and declarations which are also distinctly 'enumerated in the proper clause, and are totally different 'from those in the tailzie: That, therefore, Hugh the last Earl 'of Marchmont having possessed the estate under the charter '1736, and infeftment 1737, till his death in 1794, thereby ac- 'quired a prescriptive right in fee-simple; and further, that the 'pursuers not having been called to the succession under these 'titles, the defender, whose right is derived from the last Earl 'of Marchmont, has produced a sufficient title to exclude the 'pursuers founding their right on the entail of 1704: On these

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Mar. 10, 1823. 'grounds, assoilzies the defenders from the conclusions of the 'libel, and decerns.'

Against this judgment the appellants reclaimed; but the Court, on the 19th of February and 27th of May 1819, adhered.* The appellants then entered an appeal, and contended,—

1. That as the deed of tailzie in 1704 contained effectual clauses against altering the order of succession, Earl Alexander could not competently grant any deed for making an alteration of that course of succession; and therefore, if the deeds of 1736 were to be considered as inconsistent with the original tailzie, they were null and void.

2. That the deeds of 1736 were expressly qualified with the limitations of the original tailzie, because the dispositive clause in the charter conveyed the lands subject to the conditions of that tailzie, and precept was given to infeft subject to the conditions 'supra script.,' and sasine was taken under the conditions 'sub-'script.,' which referred to those of the original entail; and therefore the deeds of 1736 could form no title of prescription, so as to create a more extensive right to the lands then under the entail of 1704: And,—

3. That supposing they could afford such a title, still, as they were qualified by the limitations created by the original tailzie, under which the appellants had right to the estate, they were entitled to claim by virtue of these deeds, and independent altogether of the original tailzie; and that, even by the deeds of 1736, Earl Hugh was effectually prevented from executing the trust and entail of 1794.

On the other hand, it was maintained by the respondents,—

1. That the original tailzie was entirely superseded and swept away by the charter and infeftment in 1736, and the possession had thereon, which titles thenceforth became the governing investiture of the estate.

2. That although, in framing the charter and sasine, the terms of the original tailzie had been introduced, yet this had been done merely historically, and with the view of describing the subjects; and that accordingly the charter was granted, and the sasine taken, only under the reservations contained in the contract of marriage.

The House of Lords 'ordered and adjudged, that the said 'petition and appeal be, and is hereby dismissed this House; and 'that the said interlocutors therein complained of be, and the 'same are hereby affirmed.'

Appellants' Authorities.—2. Ersk. 3. 23. 24; 1. Jur. Styles, 438.

J. RICHARDSON,—SPOTTISWOODE and ROBERTSON,—Solicitors.

(*Ap. Ca. No. 6.*)

* Not reported.

J. STEWART and E. DREW, Petitioners.—*Wetherell—Warren.*
EARL of STAIR and Others, Petitioners.
J. V. AGNEW, Petitioner and Respondent.—*Gifford—Sugden.*

No. 57.

Appeal — Process—Rehearing.—Held incompetent to rehear a case on the merits formerly argued, and on which judgment had been pronounced by the House of Lords; but that the judgment might be amended as to a point on which no decision had been given by the Court of Session, and on which no argument had, through misapprehension, been stated in the House of Lords by the party against whom the judgment was pronounced.

AFTER the judgments had been pronounced, noticed ante, p. 320 and p. 883 (which see,) reversing the decision of the Court of Session, and finding that the estate of Barnbarroch was not attachable for the debts of John Vans contracted subsequent to the date of the entail of that estate and of Sheuchan, and not made real prior to the date of infeftment—that the sales had not been lawfully made, and that the appellant, Mr. Vans Agnew, had right to the lands which had been sold, and to the rents from the period of his succession as an heir of entail,—he presented a petition to the Court of Session, praying it to apply the judgment of the House of Lords in ordinary form, by pronouncing decree conform to it. This was opposed by Messrs. Stewart and Drew, and by the Earl of Stair and others, the respondents in the appeals, who moved the Court, as Parliament was not met, to supersede advising the petition until they could have an opportunity of presenting a petition to the House of Lords to be reheard. The Court, on the 15th of November 1822, in consequence of this motion, superseded advising the petition for Mr. Agnew till Tuesday then next, in order to hear counsel, and required the respondents to lodge a minute, stating their intention to apply to the House of Lords on the meeting of Parliament. Counsel having been accordingly heard,

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Lord Glenlee observed—If there had been any specific command by the House of Lords, ordering the judgment to be carried forthwith into execution, it must have been immediately obeyed; but the remit is, to do that which is just, and consistent with the judgment. The one party says that we must forthwith carry it into execution, while the other prays that this may be delayed for a short time. Both of these demands are consistent with the judgment; and therefore we are left to decide which is the most consistent with justice. No doubt, if there had been any act of sederunt, or any established and fixed course of practice, requiring that the judgment should be applied so soon as it was presented, then we could

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Lord Robertson.—We all know that we must obey the judgment of the House of Lords, and it is our inclination to do so; but we do not disobey it by delaying for a short time to carry it into execution. The question therefore seems to be, what has been the practice in similar cases? Now it appears that it has been the immemorial custom immediately to pronounce judgment in terminis of that of the House of Lords. The opposition of the respondents is unprecedented, and no example of it being sanctioned has been shown, either in this Court or the Courts of England. So far as practice is concerned, therefore, it is hostile to the respondents. To get out of it, and in order to succeed, they must show, 1. That it is competent to apply to the House of Lords to rehear; 2. That they have good grounds for such an application; and, 3. That if this Court refused to delay, they would be without a legal remedy. As to the first point, I am satisfied that the competency of the application has been clearly

established in virtue of the standing order of 1694, and the several cases which have been referred to. At the same time, a rehearing appears to be not a matter of right, but a remedium extraordinarium, for which cause must be shown. With regard to the second point, I can conceive cases where the Court might pause before giving effect to the judgment, so as to get it rectified, as if decree were given for £2000 where the summons concluded only for £1000; but this case is not of that description. It is a delicate thing for this Court to inquire whether there are grounds for the House of Lords reconsidering a case which they have decided. Into these I shall not enter. It has, however, been said that the appeal against Stewart and Drew was incompetent under the 48th Geo. III.—that the representatives of some parties who have died were not called—and that the applying of the judgment would be equivalent to execution, so that a removing might immediately take place. With regard to the objections to the competency, these ought to have been stated to the House of Lords; but they were not. Neither do I think that a removing could be immediately enforced. There is no order to that effect in the judgment, and there is no prayer for it in the petition before us. Besides, by the order which has been already written on the petition, the case is taken away from the House of Lords; and therefore, in form, there is a difficulty as to a rehearing. Whether the respondents can appeal against the interlocutor applying the judgment, it is not necessary to decide; but I think we are called on to apply it. Mar. 12. 1823.

Lord Bannatyne.—This is a case of great delicacy and importance. No such application as that made by the respondents was ever brought before us. I conceive that in this matter our duty is merely ministerial, and that we have no right to inquire into what may be the effect of the judgment. The House of Lords, like every other human tribunal, may err; but it does not belong to this Court to consider whether it has done right or wrong. It is our duty to put that judgment on record, and carry it into execution, by proceeding in terms of it. All that the respondents say amount to this, that the House of Lords have committed an irregularity. We cannot judge of that. They must go to the House of Lords, and if they satisfy them, I do not see that any proceeding of ours can prevent that House from rectifying their error, if they are satisfied that there is one. Neither do I see anything to hinder the respondents from appealing against our interlocutor applying the judgment. But, at all events, I think we must apply it; and if we did not, a precedent of most dangerous consequences would be established.

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Lord Craigie.—There is perhaps a difficulty and delicacy in the case, so far as it may go to impeach the judgment of the House of Lords, which we cannot do; but in other respects I do not see the least difficulty. In the case even of a final decree here, it is competent at any time before extract to get any mistake rectified, or have it recalled when exposed to plain nullities. The House of Lords is a Scotch Court in reference to appeals from Scotland, and it must decide according to Scotch law; therefore I apprehend that what is competent here must be equally so there. In this case the House of Lords has directed this Court to do that which is consistent with its judgment, and just; therefore we are entitled to consider what is just and reasonable in the circumstances of the case, and are not called on to do that which is nimious and oppressive. But if we were to apply the judgment, I apprehend instant execution by removing might take place. In the circumstances, that would be most oppressive; and therefore, as I think a rehearing is competent, we ought to supersede applying the judgment till the respondents have had an opportunity of going to the House of Lords. It does not appear to me that, by writing on the petition, the case is removed from the House of Lords.

Lord Justice-Clerk.—We are certainly called on to perform a delicate and important duty, whether we regard the interest of the parties, or the law in general. I conceive, however, that there is no such immemorial custom as assumed by Lord Robertson, which requires us forthwith to apply the judgment; neither do I think that the presenting of this petition has the effect to remove the cause from the House of Lords. And if a rehearing be competent, I do not see that it is necessary for us to inquire whether there are such grounds as would induce that House to allow it. To me it appears that the standing order of 1694 decides the question as to the competency of a rehearing; and this is supported by the precedents which have been referred to. The ultimate fate of these applications is of no importance in this question; but I observe that in one case the petition was granted, so that at least it is clear that such petitions have been entertained. Indeed it would be the height of presumption in this Court to decide that a rehearing in the House of Lords is incompetent. The question therefore comes to be, whether we are imperatively required forthwith to apply this judgment? If we were to do so, we must go on to execute it; and thereby the cause would be brought here, and so taken away from the House of Lords. But there is no order on us to do so on the instant;

and although it has been our practice, where no opposition was made, to apply the judgment, yet I see that in the case of Scott v. Brodie, 8th March 1803, answers were allowed to the petition, so that some delay must have taken place. See also the case of Campbell, July 1743, (14968,) where the Court ordered precedents to be laid before them, prior to carrying the judgment into execution in the mode required. It is said, however, that if we apply the judgment, the respondents may appeal; but the competency of that does not appear; and at all events it would bar the rehearing. If, therefore, the respondents have a right to be reheard, we ought to do nothing to deprive them of that right; and as it has not been shown that we must forthwith apply the judgment, I think we ought to supersede advising this petition till the tenth sederunt day after the meeting of Parliament. Mar. 12, 1823.

The Court accordingly, on the 3d of December, superseded advising the petition 'until the 10th sederunt day after the meeting of Parliament for the dispatch of business.'*

In consequence of this, Messrs. Stewart and Drew, and the Earl of Stair and others, presented petitions to the House of Lords. By the former it was stated, that the judgment was not agreeable to the law of Scotland:—that as the Court of Session had found that the estate of Barnbarroch was affectable for the debts of John Vans generally, they had, in their argument at the bar of the House of Lords, conceived that they were only called on to support that decision, and that the question, as to whether any distinction could be drawn between the different classes of debts, was one which had not hitherto been argued:—that, however, the House of Lords had pronounced a judgment on that question, and that they ought, consistently with justice, to be allowed an opportunity of being reheard generally, and at all events on that point. Their prayer was, 'That your Lordships will be 'pleased to order that the appeal may be reheard, and that you 'will recal the judgment pronounced, and affirm the decree ap-'pealed from; or at least that your Lordships will alter the judg-'ment, so far as to find that the estate of Barnbarroch was affect-'able for all the debts generally which John Vans owed at the 'date of recording the infeftment of 1775, so far as the same re-'mained due at his death; or to do otherwise, as to your Lord-'ships in your great wisdom may seem proper.'

By the Earl of Stair and others (who were purchasers under

* See 2. Shaw and Dunlop, No. 63.

Mar. 12. 1823. the act of Parliament) it was stated, that the decision of the House was contrary to the established law of Scotland:—that as the Court of Session had assoilzied them generally, the only question which had been or could be argued at the bar of the House related to the validity of the sales; but that their Lordships had found them liable for the bygone rents—a point on which they had never been heard, and against the claim for which they had well-founded defences. Their prayer was, 'That your Lordships will be pleased 'to order that the said appeal may be reheard generally, and 'that you will recal the judgment pronounced, and affirm the 'decree appealed from; or at least that your Lordships will be 'pleased to order the said cause to be reheard upon such of the 'points aforesaid as you shall see fit, and to make such alteration 'upon the said judgment as to your Lordships, upon such rehear-'ing, shall seem just; or to grant to your petitioners such other 'relief in the premises, as to your Lordships in your great wis-'dom shall seem meet.'

On the other hand, Mr. Agnew presented a petition, praying that an order should be issued to the Judges of the Court of Session forthwith to carry into execution the judgment of the House in terms of the remit.

After hearing the counsel for the parties, the House pronounced this judgment:—'The Lords being satisfied, that although the 'appellant's demand of the rents of the entailed estates, from the 'period of his accession to those estates, was properly and accord-'ing to the ordinary forms of proceeding before the House at the 'hearing of the appeal, and ought, according to such forms and 'the practice of the House, to have been made a subject of dis-'cussion at the hearing of such appeal, if the respondents had con-'ceived they had grounds for disputing such demand, consistently 'with the judgment of the House in favour of the appellant on 'the principal question, unless the respondents had submitted to 'the House that the discussion of that question might be remitted 'to the Court of Session, being a question which had not been 'argued in that Court, and the House had thought fit to remit 'the same accordingly; and the Lords being also satisfied that the 'particular question respecting such rents had not been argued, 'or proposed to be argued, at the hearing of the appeal; and con-'ceiving that the neglect of the respondents to argue such question, 'or to request that the question might be remitted to the Court of 'Session, had arisen from a mistaken apprehension on the part of 'the respondents that, as the question had not been discussed in 'the Court of Session, it was not necessary, or consistent with the 'forms of proceeding in this House, for the respondents to attend 'thereto on the hearing of the appeal; the Lords, therefore, con-

'ceiving that the neglect on the part of the respondents, either to 'discuss such question on the hearing of the appeal, or to request 'that it might be remitted to the consideration of the Court of Ses- 'sion, arose from such misapprehension;—the Lords think fit, 'under the particular circumstances of the case, to order, and it is 'therefore ordered by the Lords Spiritual and Temporal in Parlia- 'ment assembled, that the said judgment be amended by omitting 'the words 'along with the rents from the period of his accession "to the entailed estates,' and inserting instead thereof the words, "without prejudice to any question which may be made in the "further proceedings in the Court of Session touching the rents "of the entailed estates, and the application thereof during any "period of time.' And it is further ordered, that as to all other 'matters prayed by the said petition of the respondents, the same 'be rejected, and the said petition be dismissed.' Mar. 12. 1823.

Lord Redesdale.—Your Lordships have appointed to-day for the consideration of the petitions with respect to an appeal which was before your Lordships the last session of Parliament, in which Mr. John Vans Agnew was the appellant, and James Stewart and Ebenezer Drew, and several others, were the respondents; and another appeal, in which Mr. Agnew was appellant, and the Earl of Stair and others were respondents. Your Lordships, upon the hearing of those appeals, pronounced judgment reversing the judgment of the Court of Session, and sending, with your judgment, the cause back again to the Court of Session. The effect of the order which your Lordships pronounced was to dismiss the subject from the consideration of the House, and to remit it to the Court of Session to execute the judgment which you had pronounced on the subject.

The appeal in which Mr. Stewart was respondent, was an appeal from the decision of the Court of Session in 1784. The question in discussion upon that appeal it is not necessary, with the view I have of this subject, particularly to state to your Lordships. It was a particular question, whether certain estates were subject to the debts of a Mr. John Vans, the appellant's grandfather. The appellant, the present Mr. John Vans Agnew, was at that time a minor, and entitled only to an estate in tail in the property in question, under what was conceived a strict entail, after the death of his father. The decision in the Court of Session was adverse to his rights, as he conceived, charging the property, notwithstanding the entail, with all the debts due by his grandfather at the time of his death. The suit in which this decree was pronounced, was instituted by two persons of the name of Stewart and Drew, on their own behalf, and as assignees of and interested for the creditors of the late Mr. John Vans; and the question was, Whether the property was or was not subject to all the debts at the time of the death of that Mr. Vans of Barnbarroch, or was subject only to such as existed prior to the infeftment

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being taken, according to the nature of the entail of this property, which was made a considerable time before?

The case coming before this House, your Lordships reversed the decision of the Court of Session, and your Lordships decided that the property was subject only to those debts of Mr. Vans of Barnbarroch which were made real charges upon the estate, before the deed of entail was made a proper settlement by taking infeftment upon it. Your Lordships therefore disposed of the subject.

The petition which has been presented to your Lordships on behalf of Mr. Stewart and Mr. Drew,—who are not the persons that were originally the parties to the suit in 1784, but are only the representatives of those two persons,—the petition which you have now under consideration proceeds upon the idea that your Lordships have erred in that judgment, and that, having erred in that judgment, you ought therefore to review the judgment which you have so pronounced.

In consequence of the petition having been presented, I have looked with the utmost care and attention into all the cases in which it has been suggested that the House has done anything in the nature of a review of its former proceedings. The earliest instance which has been submitted to our consideration, is one which I shall take the liberty of laying wholly out of the case; because, in the first place, the original decision was on the 3d of May 1642, which, your Lordships will recollect, was early during the period of rebellion, after his Majesty King Charles the First had left this part of the kingdom—had demanded entrance into his own fortified town of Hull—had been refused entrance into that town—and had declared the persons who so refused him an entrance guilty of high treason. Proceedings at that time were, after the Restoration, in many instances considered as not very regular proceedings in this House. But that is not the sole objection; because, really and truly, the proceeding was not a proper subject of appeal to this House, for it was an appeal, not from a regularly constituted Court in Ireland, but an appeal from an order of the Privy Council in Ireland—one of those proceedings which had been made the subject of the impeachment of the Earl of Strafford; and your Lordships find, that when the case was ultimately disposed of after the Restoration, when an attempt was made to review the proceedings, it was treated as an illegal and irregular proceeding from the beginning to the end, and one in which the House ought not to have interfered. That case I shall lay entirely out of your Lordships' consideration, on account of the particular circumstances attending it.

Other cases that have been mentioned are really of a description that, if the manner of the proceedings of this House had been at all understood, never would have been mentioned as justifying such an application as that which is now made to your Lordships. It was formerly not uncommon for your Lordships, when an appeal came to this House from a Court of Equity in this country, and there was a doubt upon the question, to direct an issue to be tried, for the purpose of ascertaining the facts; and your Lordships did not upon that issue remit the cause to the Court from

whence the appeal came, but you retained the cause in your own House, meaning to deal yourselves upon the result of that issue, as you might think the result warranted you, in reversing or affirming the decree. Mar. 12. 1823.

The first of this description that I find is Scudamore v. Morgan, in which your Lordships, on the 4th of March 1677, reversed the decree pronounced in the Court of Chancery, and directed such an issue. Your Lordships made orders, and directed the Court of Chancery to make orders, pending the trial of the issue; and after the issue had been tried, your Lordships affirmed the orders and decrees complained of. It is very evident, therefore, that you retained the whole proceeding in your own House, until, upon the trial of the issue, the facts found upon that trial convinced you that the decree which had been pronounced in the Court below was right; but there was no finding of your Lordships, disposing of the cause, until you pronounced a judgment, after that having been done, and then the cause was entirely disposed of.

There was another case of Chute v. Lady Dacre, which seems also to have been most extraordinarily misapprehended. The case of Chute v. Lady Dacre was heard on the 12th of November 1680. The Chancellor at that time had been obliged to withdraw from the House in consequence of illness; but it was not an uncommon thing, I see by the Journals, at that time, for the House to hear an appeal in the form of a committee; and this appeal was so heard. The committee were of opinion, generally, that the decree ought to be affirmed; but it does not appear that any order to that effect was understood to be made, because, on the 19th of November, the House took into consideration the perfecting of the order. In that case they therefore had conceived that they had not completed what they had proposed to be done. This was not on any application of the parties, but on the part of the House. The question that was then proposed was, Whether Mr. Chute's counsel should be heard to certain points only? At length an order was made, that he should be heard to these points. The House gave particular directions upon those points, and having given particular directions to those points, disposed finally by their judgment of the cause, so far as it came before them by appeal. Both parties afterwards petitioned the House against the order that had been made, and the House rejected both the petitions; because, as I conceive, they considered the thing had then passed—that it was res judicata—and that it was not competent to them to hear more upon the subject.

There was a case which came before the House in March 1689, in which the House made a decree, as it was at the time understood, with the consent of all parties. A person of the name of Warren, who was one of the parties to the appeal, afterwards presented a petition, by which he alleged that the decree had been unduly alleged to be a decree by consent. On investigating the subject, that was found to be an untrue assertion. If it had been a true assertion, and the House had been deceived upon the subject, as your Lordships will find in a subsequent case, then perhaps the House might have proceeded, upon that ground, to have re-

Mar. 12. 1823. considered the case; because, if the House is imposed upon by a fraud, that may be a ground for revising the judgment so fraudulently obtained. However, as it seems it was untruly alleged, the House affirmed what they had before done, and they heard the application simply on the point, whether that decree had been obtained by misrepresentation or not;—they would not hear it on any other.

There are other cases in which additions have been made, where the House have omitted necessary words. In fact, as your Lordships will see, the omission of those necessary words made what they had done imperfect, and they rendered their order perfect by the insertion of the necessary words. There are other cases in which there have been evident mistakes. Mistakes in the form of a judgment may be amended in the Courts of Law. There is a considerable number in which the House proceeded, as they did in the case of Scudamore and Morgan, which I mentioned some time ago to your Lordships, to direct issues to be tried for the purpose of ascertaining the facts, before they would determine whether they should or should not affirm or reverse what had been done in the Court below; and it seems to have been the practice in those early times to detain the cause in the House until the issues were tried. Your Lordships are aware that now it is the practice, instead of doing that, (which is really very inconvenient,) to remit the cause back to the Court from which the appeal is made, and to leave to that Court the trial of the issues, and the directions that may be consequent upon the event of that trial.

There is a number of cases which are somewhat of a similar description, though not exactly so. Your Lordships will find, that, during the period which elapsed between the Revolution of 1688 and the appointment of my Lord Somers to be first Keeper, and then Chancellor, the Great Seal was constantly in commission, and one of the Commissioners acted as Speaker of this House, and the then Lord Chief Baron acted as Speaker. The consequence was, that the Lord Chief Baron, acting as Speaker, was here simply as Speaker on the hearing of those appeals, and consequently could say nothing upon the subject, but as the House thought fit to propose questions to him. Consequently, from this there arose a habit of proceeding which prevailed for a considerable time, that when the Court below, the Court of Chancery or the Court of Exchequer, had dismissed a bill, if the House of Lords thought it ought not to be dismissed, the House reversed the decree, and did nothing more; the consequence of which was, that it was impossible to know what the Court below was to do. They did not remit to the Court below to do what was fit to be done in consequence of the reversal of the decree; they did not in any manner express to the Court below what decree ought to have been made, but they simply reversed the decree; and they seem, in consequence, as it would appear, of the representations of the officers of this House that this was the proper way of making their orders, to have persisted in this practice until Lord Somers became Keeper. When Lord Somers became Keeper in 1693, he obtained an alteration of that

practice, and then the House remitted the cause back to the Court of Chancery, or the Court of Exchequer, for the purpose of that Court doing that which became fit, in consequence of the reversal of that decree; or they remitted it back with such orders and directions as the House thought fit to give upon the subject. In those cases petitions were presented by the parties to the House, and many of them, I conceive, improperly disposed of, because the House had not pronounced a proper judgment; and whenever they were not disposed of, it was right they should be. In the first case that came before the House after Lord Somers was Keeper, proper directions were given by the House to the Court below to take a proper consideration of the subject. Mar. 12. 1823.

Another case of somewhat the same description was the very celebrated one of Philips *v.* Bury. There the House pronounced a judgment simply reversing the judgment of the Court of King's Bench. The House having simply reversed the judgment of the Court of King's Bench, it was impossible to do anything in the case, and the parties therefore petitioned the House on the subject in 1694, for the purpose of knowing what was to be done, representing that it was impossible for the Court of King's Bench to pronounce any judgment, their own judgment being reversed; that they could not pronounce a new judgment upon the subject; but that this House should pronounce that judgment which the Court of King's Bench would have pronounced, if they had seen the case in the light in which it appeared to this House. The House accordingly ordered the Chief Justice to attend; and your Lordships will find, that upon his representation, stating that it was impossible to proceed if the judgment of the Court of King's Bench was simply reversed without more, the House of Lords required the Chief Justice to state what would have been the judgment of the Court of King's Bench, if they had had the same view of the case which the House had had; and accordingly you added to your judgment of reversal that further judgment, without which there could be no justice in the case, but it would have been entirely inoperative.

I think I have pretty well shown to your Lordships what is the nature of those cases in which the House has done anything upon applications of this description, except cases in which there had been some clerical errors—some evident and palpable mistake, which had nothing to do with the merits of the case, where, for the purpose of making the judgment perfect, the House have thought fit to make an alteration of their original record; for instance, in a case where they had affirmed a judgment, with costs out of pocket not exceeding £200. That was no judgment at all, because there was no person who could ascertain what were the costs out of pocket not exceeding £200,—the House not having referred it to any person to ascertain what were the costs out of pocket not exceeding £200; and therefore the order was so imperfect, that nothing could be done upon it. This was afterwards brought before your Lordships, in regard that there was no officer of the House to tax costs. The alteration made was, by leaving out the words 'costs out of pocket not exceeding;'

Mar. 12. 1823. and after the word 'pounds' inserting 'for his costs,'—showing that the House meant that the man should have £200 for his costs,—it being conceived, I suppose, that the costs out of pocket exceeded £200. An inquiry was not thought fit to be instituted as to the actual amount of the costs. That is clearly a judgment so imperfect, that it was incapable of being carried into execution without alteration.

In another case the House had in their judgment spoken of the officer of the Exchequer, who in that Court acts as a Master in Chancery. It used the word 'Master,' instead of the words 'Chief Remembrancer 'of the Court, or his Deputy.' It is perfectly clear that your Lordships' order was imperfect and inoperative in consequence of that error; and the House, on its being pointed out, directed that order to be altered, by leaving out the word 'Master,' and substituting the words 'Chief Re-'membrancer, or his Deputy.'

One case has been very much spoken of, which is that of Luttrell v. Lord Irnham. In that case the circumstances were these:—When the appeal came before the House, there was produced, on the part of the respondent, an agreement between the parties, which was to put an end to all litigation. The House being deceived by this, they thought fit to say that they would not proceed further in the cause; and they, rather hastily perhaps under the circumstances, pronounced an order for affirming the order of the Court below. It appeared that the instrument that had been produced did not relate to the particular subjects in dispute, and Mr. Luttrell therefore applied for a further hearing; for it was quite a surprise upon the parties and the House; and the House upon that proceeded to hear—in fact, they had not heard before—they had determined nothing they did then enter into the merits, and they affirmed what had been done in the Court below.

There is another case, the case of Devereux v. Phelan, in which an application was made for a rehearing, alleging that the party was not before the House; for that, though he had been nominally a party, he had had no notice. Supposing that to be true, the House thought it was a case in which they ought to give relief, and they investigated it. It turned out that this was a most gross imposition. The petition was dismissed, and the petitioner was ordered to be taken into custody; but he ran away, otherwise he would have been punished for his imposition.

I apprehend, therefore, that the cases that have been referred to are nothing more than these:—First, the party who made the application was a party named in your judgment, but who was not before the House, as was supposed to be the case in Devereux v. Phelan; and the House certainly would not permit its judgment to injure a party who was not before them. In another case, the judgment pronounced was in itself imperfect, so that that which was intended to be done was incapable of being carried into execution, from the nature of the order of your Lordships; or, as in the case of Phillips v. Bury, from a supposition that it was not necessary for the House of Lords to make any order, further than to reverse the judgment of the Court of King's Bench, and to leave it to the

Court of King's Bench to proceed; and therefore they sent it to the Court of King's Bench without doing more. In other cases, the order pronounced was merely one directing an issue, or some proceeding, the determination upon which was necessary to the final decision, where the cause must come again before your Lordships; and you must come to a final decision upon the subject, because you had not finally decided the matter, and the thing had not been subsequently disposed of finally by you. The cause not being in the first instance disposed of finally by you, it must remain with you to consider what is fit for you to do, as it would in the Court below before they pronounced their judgment. Mar. 12. 1822.

Others are cases of errors in the form of proceeding, where the words made use of are inapplicable; as, for instance, that case where the word 'Master' was introduced instead of the words 'Remembrancer of the 'Exchequer, or his Deputy.' Any informality of that description your Lordships will correct; but, I take it, no instances can be found of your Lordships rehearing a cause for the purpose of altering the substance of the judgment—that is, for the purpose of doing that which no Court does, except under the particular circumstances which the practices of certain Courts admit of. Your Lordships know that in the Court of Chancery, for instance, and in the Court of Exchequer, rehearings are permitted under certain circumstances; but, if a decree has been signed and enrolled, the appeal must be to this House. Formerly this House would not allow of appeals until the judgment was perfected and enrolled, though now it is otherwise. That practice was found to be inconvenient; and the House has acted otherwise, and permitted appeals when the decrees were only in paper. If a case comes from a Court of Law, and the House reverses the judgment, it must pronounce that judgment which the Court below ought to have pronounced, if it had been of the same opinion with the House. If it omit to do so, its judgment is imperfect; and in that case also the House has pronounced that judgment,—but it did not rehear the cause even in that case,—but it pronounced that judgment which was rendered necessary in consequence of its judgment being imperfect, by its merely reversing the judgment in the Court below—imperfect, because it did not add that judgment which would have been a right judgment, if the Court below had entertained the same opinion which the House did of the merits of the case.

Under these circumstances, this petition of parties, under the names of Stewart and Drew, being simply, 'That your Lordships will be pleased 'to order that the appeal may be reheard, and that you will recal the 'judgment pronounced, and affirm the decree appealed from; or at least 'that your Lordships will alter the judgment, so far as to find that the 'estate of Barnbarroch was affectable for all the debts generally which 'John Vans owed at the date of recording the infeftment in 1775, so far 'as the same remained due at his death; or to do otherwise, as to your 'Lordships in your great wisdom may seem proper;' it is really and truly nothing more than desiring a rehearing of the whole case upon its merits.

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The ground upon which this petition seems to be put is, that when the application was made to the Court of Session in Scotland to execute your judgment, the Court of Session in Scotland thought your judgment wrong; and thinking your judgment wrong, they would not execute your judgment immediately, but they would give time to the parties to apply to the House to rehear the matter, and induce your Lordships to alter your decision, and make it conformable to what the parties thought it ought to be. Putting it in that point of view, it appears to me to be a very material question. If the Courts from which appeals are brought to this House can take upon themselves to say they will suspend the execution of the judgments that you pronounce, because they conceive that those judgments are wrong, I know not in what manner justice is to be administered. If they can do it once, they may do it twice—three times; —they may suspend the execution of your judgments as long as they think fit, because they consider them to be wrong. It is true, the suspension here was not for a great length of time. It was, however, a suspension for some months, so as to allow the parties an opportunity of making this application to your Lordships. Now it seems to me, that if I were convinced your judgment was wrong, it would be infinitely more mischievous in its consequences to permit this proceeding to take place, than to suffer your wrong judgment to remain unaltered. It is a judgment upon the merits. If a judgment can be reviewed in the manner in which it is sought to be reviewed in this case, I wish to know where there would be an end of litigation. I take it to be, generally speaking, a principle, (with the single exception I have before noticed,) that when a final judgment is pronounced by a Court of competent jurisdiction, that Court has no right to alter its judgment; and it cannot be altered, except by a writ of error to a Superior Court. If the decisions of this House, acting as a Court of ultimate resort, are subject to this sort of review, where is to be the end of litigation upon this subject? and what is to be the consequence to this House, burdened as it is with the numerous appeals that come before the House, if they are also to review their own decisions, because the Court below choose to think their own decision was right, and the decision of this House was wrong? It strikes me that it would lead to mischiefs almost incalculable; and therefore I conceive that your Lordships ought to reject this petition of Mr. Stewart and Mr. Drew.

With respect to the other petition—that of Lord Stair and a number of other persons—it is very nearly of the same nature; but they do in their petition allege something more. They were persons who had been purchasers of part of the estate in question, which the Court of Session had been authorized to sell by an act of Parliament, in a suit to which the heirs of entail were to be called as parties. The suit that was instituted was brought by a person who was entitled to possession under the entail, for the purpose of charging the property, in his own relief, with debts of his father, to the utmost extent to which it could be carried; and the proceedings were had in that cause without bringing

the minor heirs of entail (his children) before the Court, in the manner in which they alone could properly be brought before the Court,—that is, by having a curator present for the purpose of defending their interests, and seeing that justice was done to them. Your Lordships were of opinion, therefore, that all those proceedings were null and void. That was your Lordships' judgment. The Court of Session had certainly thought otherwise; but such was your Lordships' opinion upon the revision of the case, and you have sent it back to the Court of Session, for the purpose of your judgment being carried into effect. Now that is a positive judgment upon a matter properly before your Lordships; there is no pretence for saying that the judgment is not intelligible; there is no pretence entitling any one to say that the judgment you pronounced was not, at the time, the deliberate opinion of the House upon the matters before you. I do conceive, therefore, my Lords, that, so far, it is impossible to comply with the prayer of this petition. Mar. 12. 1823.

There is one thing suggested in this petition, to which I will call your Lordships' attention, because perhaps it might admit of some discrimination. At the same time I wish your Lordships to consider the difficulty which presents itself on that point. Your Lordships' judgment considered the appellant in that case (who had been one of the minor heirs of entail of the property sold) entitled to the possession of the lands that had been the subject of sale; and your Lordships added,—with the rents which have accrued subsequently to the death of his father, when his right opened. Now it was at one time insisted that that had not been sought in the Court below; that, I see now, is abandoned, and rightly so, because unquestionably it formed a part of what was demanded in the summons; but it is observed, that, according to the practice in the Court below, the summons being to reduce the instrument by which the property had been conveyed to those persons, if they had decided, as the House have decided, as to the right to the reduction, they would not have considered the question of the interim profits as immediately before the Court, without giving an opportunity to the persons who were interested in respect of those profits, to enter into the discussion whether they were or were not to be considered as bonâ fide possessors, and therefore not liable to answer for bygone profits, and particularly previous to the institution of the process of reduction. My Lords, that has had some weight on my mind; but, at the same time, if that really was not particularly discussed before your Lordships, it was the fault of those who attended your Lordships upon that occasion; because, as the appeal to your Lordships was to reverse what had been done in the Court below, and as your Lordships must pronounce a judgment following upon that reversal, it did become them to urge before your Lordships any matter that might have qualified the order which your Lordships might make with respect to the appeal before you. The only difficulty existing upon that subject is this, that your Lordships have clearly adverted to the whole of the proceedings in the Court below. If, in the Court below, a judgment would have been pronounced upon that part of the summons which prayed your Lordships for the possession,

Mar. 12. 1823. without entering into the discussion of the question of the interim benefits, and leaving that open to further discussion, how far your Lordships may think that it would have been right for you so to do, if the matter had been suggested to you at the proper time, is a question which would have been well worthy of consideration; but that time is past. The minutes of the order which your Lordships pronounced upon that occasion, were some time in the hands of the agents for the parties by direction of your Lordships; they therefore had an opportunity of making any objection to the form of those minutes, if they had thought fit, before your Lordships finally pronounced the order. No such objection was made, and your Lordships directed that the party should be restored to the possession, and also that he should be restored to the rents and profits from the time that his right accrued. . . . .

Whether these persons could or could not have justified their claim to be exempted from the charge of rents and profits from the time that the appellant's right accrued, on the ground of being bonâ fide purchasers, is a question of some difficulty perhaps, considering all the circumstances of this case. According to my recollection, it appeared upon the evidence, that some of them stand in a very different situation in that respect from others. But, my Lords, there is another consideration which is important upon this part of the case. Purchasers of this description always take assignments of the debts for the payment of which the estates are to be sold, and they take that assignment of the debts as a part of the security for their title. All these parties had the assignment of these debts. Now, if any of them can establish those debts against the estates, under your Lordships' judgment pronounced with respect to how far the estate was liable to the debts of Mr. John Vans—if they can claim those debts, with all the interest for this length of time—and if they can at the same time retain the interim profits, they will certainly not be in a very conscientious situation with relation to the appellant. I own I have on that part of the case considerable difficulty, and I should very much like to hear what the learned Lord on the Woolsack thinks upon the subject. With respect to the prayer of this petition, so far as it seeks a general rehearing, I think it ought to be rejected upon the same principle as the other, to which I have before referred.

There is a third petition of the appellant, in which he prays that the Court below may be directed to proceed according to the direction of your Lordships in the cause. I presume, if your Lordships dispose of the other petitions in the manner I have proposed, that will be a matter of course, without a particular order from your Lordships.

LORD CHANCELLOR.—This matter of Vans Agnew comes before your Lordships in consequence of three petitions presented to this House, which I will state to your Lordships. The first was the petition of the respondents, James Stewart and Ebenezer Drew; and, after stating all the proceedings that had been had in the Court of Session and this House, the prayer of that petition is, 'That your Lordships will be pleased to

'order that the appeal may be reheard, and that you will recal the judg- Mar. 12. 1823.
'ment pronounced, and affirm the decree appealed from; or at least that 'your Lordships will alter the judgment, so far as to find that the estate 'of Barnbarroch was affectable for all the debts generally which John 'Vans owed at the date of recording the infeftment of 1775, so far as the 'same remained due at his death; or to do otherwise, as to your Lord-'ships in your great wisdom may seem proper.' The prayer of this petition is divided into three parts: *First*, That the appeal may be reheard, to recal the judgment pronounced, and affirm the decree reversed; which is praying that you will hear all the matter over again. *Secondly*, That you will alter the judgment, in so far as to find that the estate of Barnbarroch was affectable for all the debts generally that John Vans owed at the date of recording the infeftment in 1775, so far as the same remained due at his death; which, in any way, is calling upon your Lordships to rehear the whole of the merits, as far as they affect the question discussed between the parties at your Lordships' Bar, what debts of John Vans did, or not, affect this estate. And the *third* prayer is, to do otherwise, as to your Lordships in your great wisdom may seem proper; which is represented fairly enough to be not calling upon your Lordships to do anything in particular, but in general interfering to such an extent as you may think fit.

The next petition is a petition presented by the Earl of Stair and several other persons; and that petition prays, first, That the appeal may be reheard generally, and that you will recal the judgment pronounced, and affirm the decree appealed from; or at least that your Lordships will be pleased to order the said cause to be reheard on such other points aforesaid as you shall see fit, and to make such alteration upon the said judgment as to your Lordships, upon such rehearing, shall seem just. The first part of this prayer is calling upon your Lordships to rehear a cause which has been heard upon its merits; and the second prayer in this petition is referring your Lordships to certain points mentioned in the body of the petition, and desiring your Lordships to rehear the cause upon such of those points as you may think fit.

The third petition is a petition presented by John Vans Agnew, the appellant before your Lordships last year, and in whose favour the judgment now complained of is pronounced; and that petition, after stating what has passed in the Court below, and the interlocutor of the 15th November 1822, by which the Lords of Session 'supersede the considera-'tion of this petition until Tuesday next, with the view of allowing the 'respondents to be then heard by counsel thereon;' and finally, having resumed consideration of that petition, 'supersede advising the petition.' That was a petition praying that the judgment of this House might not be carried into effect 'until the tenth sederunt day after the meeting of 'Parliament for the dispatch of business.' And this petition prays that your Lordships will be pleased to take the matters into consideration, insisting that, by this proceeding of the Court of Session, the judgment of your Lordships' House, pronounced in favour of the petitioner upon

Mar. 12. 1823. solemn consideration, has been suspended in the Courts below, and that you will adopt such means as shall be best calculated to carry into effect the judgment of this House, by making such orders as shall ensure prompt obedience to the judgments of your Lordships on the part of the Court of Session, and shall thereby procure to the petitioner that redress which it was intended to afford him by the judgment of this House.

With respect to the last petition, I cannot but persuade myself that it would be totally unnecessary to make any order, if you were pleased to be of opinion that you can do nothing upon the other petitions. I cannot bring myself to think that the Court of Session would require to be told by any order of your Lordships that they were to abide by that judgment. I should not act towards them with the respect I bear them, both as a body and as individuals, if I did not perfectly persuade myself that such order would be unnecessary. I am still willing to consider what has passed, as produced, not by that Court acting upon any notion that the House of Lords was wrong; because, whether the House be right or wrong, the judgment of this House must be obeyed by all the Courts below, although I have lived long enough in the profession to which I belong, to know perfectly well that in many instances in our Courts, as well as in the Court of Session, the judgments of this House have not been altogether recognised as right by those who in the Courts below judged of them; but all the Courts have felt that they were under the obligation to take those judgments to be right in the matter in which they were pronounced, however far they did or did not apply the doctrines maintained in those judgments to other cases not exactly similar in circumstances; and I am desirous, whatever might have been said by the counsel in the Court below, arguing with a degree of zeal founded upon their own opinion as to the judgment in the House of Lords, and attending to what has been reported to be said by the Judges in the Court below, in which it appears to me the Judges treated this House with great respect, I cannot help saying that your Lordships have a standing order about rehearing causes; and looking at this as a case in which the Court of Session have twice decided contrary to the ultimate decision of the House of Lords—looking upon it as a case in which the decision was a very important decision with reference to the effect of the act of Parliament, they seem to have had such a notion about the nature and effect of your Lordships' general order upon rehearing, as made it, in their judgment, till the matter was considered in this House, fit to give the parties an opportunity of applying to have the matter reheard.

Taking this course, the question your Lordships have to decide relates to the rehearing of a cause upon its merits; and it is not to be denied that you have on your standing orders one which, in its terms, is likely enough to mislead those who do not very accurately understand what the proceedings of this House are. My Lords, that standing order was made upon the 14th of February 1694, in which it is ordered, 'That no petition which relates to the rehearing of any cause, 'or part of a cause, formerly heard in this House, shall be read the

'same day that it is offered, but shall lie upon the table; and a future 'day be appointed for reading thereof, after twelve o'clock.' That is one of the standing orders of this House, and those who are not very conversant in what have been the proceedings of the House under that order, might naturally enough think it had a much more general effect than has been given to it. It follows—if your Lordships recollect another order which limits the time within which appeals shall be brought, and if the mode of proceeding in hearing appeals was taken to apply to the hearing of a cause upon the merits—your Lordships would have made some order as to the time within which they should be heard, or what number of rehearings there should be. My Lords, it seems to me, that if your Lordships will look at the constitution of our Courts of Justice, (meaning the House of Lords as one of them,) your Lordships will see a reason naturally attaching itself to the proceedings of the House of Lords against rehearings upon the merits, which does not apply to the other Courts. With respect to the Courts of Equity, a rehearing is a matter of right to a certain extent. If a judgment is pronounced by the Vice-Chancellor, you may apply to the Chancellor; if a judgment is pronounced by the Master of the Rolls upon the merits, you may apply to the Chancellor; if the Chancellor hears a cause in the first instance, you have a right to call upon him to rehear the cause in the House of Lords, it being very generally the case that the Chief Judge in the Equity Courts below has a seat in your Lordships' House, where his judgment may be explained by himself. This House is protected from that. It does not rehear causes that come to it from the Courts below. In the Courts of Law, causes may be ordered to be reheard; and if the case come here, your Lordships have a right to order the Judges to attend, and take the opinion of all these Judges seriatim, if they differ, or on the general opinion of all of them delivered by one, if they happen to agree. The House, therefore, has a great safeguard thrown round it, with a view to enable it, in the first instance, to give satisfactory decisions. Certainly, from the nature of the constitution of the Courts of Scotland, we cannot have in this House the same degree of assistance, and perhaps it is to be lamented we cannot have it; but the House has always been extremely careful; it may certainly fall into an error, or some degree of negligence, in an occasional instance; I cannot undertake to say it has not, in a very long memory of what has been passing here; but the House has endeavoured to throw around itself a protection as to Scotch causes; for, whatever observation may have been made upon the first Noble Lord whom I remember upon the Woolsack—I mean Lord Bathurst—I must take the liberty of reminding all persons who may have alluded to that Noble Lord, that I believe he was generally assisted, in Scotch causes at least, by a person of a name very much revered in Scotland —I mean Lord Mansfield. With respect to Lord Thurlow and Lord Loughborough—and I can speak of it with perfect confidence as to myself, for I never approach these Scotch causes without great fear and apprehension that I may be wrong, endeavouring, if possible, to be

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Mar. 12. 1823. right, but with great feelings of apprehension that I may be wrong —where the question has been one of considerable doubt, and where the House has looked upon the case as a question of great importance —I will go the length of saying, if it had been called upon to determine at the moment, it would have so acted in appeals of this sort, with a view to obtain that protection, as well as it can, which it receives in the cases of English appeals,—it has been in the habit of remitting to the Court of Session, that they might reconsider their judgment. That has occasioned some complaint, addressed to myself, of my practice to a very considerable extent indeed, in some period of the time that I have had the honour of sitting here. But there is one circumstance which is extremely discouraging, and that is with respect to matters of costs. The Court of Session gives costs much more generally than we do here, where we have a discretion; and after the experience of a great many years, and hearing the opinions of a great many persons who ought to be able to form just opinions upon that subject, I believe, in this part of the island at least, those who have had the most experience have always held it would be a most extremely improper thing that costs should follow the event in Courts of Equity; and I look upon the Court of Session as a mixed Court of Law and Equity; but undoubtedly I have sometimes felt, that when a remit has been made, (which is not what the party prays for,) but a remit which this House thinks necessary for its better information upon an important and difficult subject, I have been sometimes disposed to think it was rather hard upon a person, where the Court of Session again affirms a former judgment, to make him pay the expenses of the remit back by this House; and it is not without example, (though it is that upon which certainly the House should be very careful how it acts when it does it,) but it is not without example, where the House have reversed both judgments in the Court of Session.

Looking at the constitution of our Courts, give me leave to say, that I apprehend, upon grounds very satisfactory, looking at the general interest, it is infinitely better that the matter should be here finally decided upon one hearing, even if the decision is wrong, than that there should be a new litigation unknown to our proceedings, as to this matter of rehearing;—nor can any one say where it is to stop. In general, it is to be hoped the decisions of the House are right; but, whether right or wrong, it has been taken for granted that considerations of infinitely greater moment than the considerations which arise out of the particular mischief in particular cases, have led this House to determine, that where a matter has been heard between the parties at the Bar, and the House has given its decision upon the merits discussed by those parties, the House will not rehear the cause. And give me leave, most respectfully—for it becomes not the lips of a Judge to utter anything not respectful to those who hold judicial situations—give me leave only to ask, if we are to have hearings and rehearings, what would have been accomplished with respect to the appeals upon your Lordships' table in the last twenty years? I state that, with the highest respect for the individuals who

have argued matters at your Lordships' Bar, and with the highest respect to persons holding judicial situations in Scotland; I have never been otherwise than disposed to do great justice to the merits of both; but I have heard it stated, and that over and over again, that if we were to decide so and so, we should ruin the whole law of Scotland, and put an end to it as to the particular point then before us. And I know that when we have reversed the honest opinion, and the learned opinion, of the Judges in the Courts of Scotland, those very persons who have told us we were about to destroy the whole law of Scotland, have, in after cases, admitted that we have established the law of Scotland. All that the public have a right to expect, and all that the Courts in Scotland have a right to expect—and they have that right—is, that those who are to assist and advise your Lordships should task their industry and attention to the very utmost; but to say that the Judges in this House are not to decide according to what may be their conviction of the law, and that they are not to abide by that opinion, is to make a farce of an appeal, and is sacrificing the first principles of our judicial constitution. I am sorry to make these observations—I never do so without great pain; but if upon this occasion we are to take the judgment to be wrong in consequence of what we have heard, still the question now to be discussed is, Whether, according to the law administered in this House, that judgment, as it is stated to be, is to be reheard upon the merits of the question discussed at the Bar between the parties? I shall say no more than this, than that I desire it may not be understood that I think that judgment wrong. I gave that judgment, speaking for my own part, under a solemn impression that that was the judgment which an attentive consideration of my duty required me to give. I will not say more upon that; but I will address myself to the question, whether you can rehear it upon its merits, admitting it, if you please, for the sake of argument—but not admitting that I think it is in fact and substance—a wrong judgment. Your Lordships, however, will allow me to say, if I have been misled in this—and I am admitting myself to have been misled, for the purpose of the argument—when I look at the name of Sir Ilay Campbell—when I look at the names of Mr. Maclaurin and Mr. Crosbie—and when I look at the name of Lord Braxfield—(and I am much at a loss to know how he is to account for having formed that entail, if it is to have no other effect than has elsewhere been attributed to it)—if I have erred in this business, I have erred with men of great names; I am sorry to have erred with anybody. Mar. 12. 1823.

Now, let us look at what our rehearings are. First, allow me to place myself in this part of the island. Do your Lordships think I have lived so long in the profession, without knowing that counsel have frequently retired from that Bar with something more than a doubt whether the judgment pronounced on this side of the Bar was right? But it was of very little consequence what we counsel thought. But have I not heard every day in my life—sometimes in the King's Bench, and sometimes in the Court of Chancery—Judges avowing that they could not agree in the

Mar. 12. 1823. judgment of the House of Lords, though they admitted that that judgment bound them; and, carrying it to this extent, not scrupling to say, though they were bound by that judgment, and must apply that judgment in all cases exactly similar to it, yet, if they could find the slightest iota of difference, they should feel that a ground for acting upon their own opinion, and not ours? Take the case of Fytche v. the Bishop of London, on Simony;—see what the Court of King's Bench have been saying upon that case. There are other cases we might mention, in the Court of Chancery and elsewhere. I have no difficulty in saying here what I have said judicially elsewhere in the case of the Duke of Newcastle v. Lady Lincoln, (and your Lordships will recollect how strongly I opposed that judgment in this House); I thought it wrong, and I thought it my bounden duty to oppose it. I do not scruple to say, that I so little felt the authority of it, though bound by it, that if other circumstances were to be found in any other case that might be assimilated to it, I should think myself at liberty to see whether those circumstances did not let me loose from that judgment.

In looking at this case, I have wished very much to learn, what I have not learned, whether there is any such instance, or could be, of a rehearing of a Scotch cause in the Scotch Parliament. I have not heard that there is any such instance. Then, if we look at the Act of Union, as making this House the Court of dernier resort in Scotch appeals, we cannot apply any practice of the Court of Parliament in Scotland to the rehearing of Scotch appeals in England.

Look at English appeals. In the first place, as to the precedents quoted from the particular period of the century before the last, it is enough to say, if they amounted to anything, that if you look at them seriously, you cannot make much of them; for I believe I speak that in which I wish to be correct, when I say this of the precedents of that period as respects this House. But if you take cases where there are clerical errors, where judgments have been obtained in the way in which many or some judgments have been obtained—that is to say, a party has come to the Bar and argued his case, and suffered the House to suppose that notice was given to the other party, when that was not the case,—the observation made has been, You come not for a rehearing, but a hearing. I will take the case of Luttrell v. Lord Irnham, where an appeal was supposed to be barred by an order made by consent. It was shown to this House, upon an application for a rehearing, that it was all a mistake, and a surprise upon the House—that it was not such a consent as it was represented to be. So, where a fraud is practised upon the House, and the party, by the operation of that fraud, obtains the judgment of the House, a judgment so obtained by fraud upon your Lordships is no more than the judgment of any other Court obtained by fraud, and is an absolute nullity. None of the cases establish this—that this House will rehear a cause upon its merits;—and when we come to consider how many cases there are in which there must be a very strong appetite to rehear, and without any attempt being made to rehear it, and

how strongly the interests of persons would lead them to apply for a species of proceeding so well known in the other Courts in other cases, I should think there might be, if I may say so, a little itching even in Scotland to bring back causes for rehearing,—and yet we have heard of no such thing since the Union. The cases do not prove that this House will rehear a cause upon its merits; and the absence of any such case is a strong negative authority to show that the House will not do so. But whether we are looking at the question generally of rehearing, or at this particular case as to what debts of John Vans affected the estate at his death, or at the question whether the House have rightly decided against the purchasers under the act of Parliament,—(who, it has been said, have legislative titles that ought not to be disturbed; and I admit, if they have legislative titles that ought not to be disturbed, they ought not to be disturbed); but the House has adjudged that that act of Parliament was not pursued; and if it was not pursued, it would be just as good an authority for a sale in the Court of Chancery in England, as in the Court of Session in Scotland.—Still, however, whether it has decided this matter right or wrong, rehearings as to these points are rehearings upon the merits. Mar. 12. 1823.

There is another point, as to the act of the late King for the administration of the law in the Court of Session in Scotland. It has been said that that formed an objection to one of the parts of your Lordships' decision. In the first place, it does not apply here; and if it did, there is no foundation for the observation.

There is one other point which I confess has distressed my mind extremely, and that is the point which the learned and noble Lord adverted to the other day—I mean about the rents and profits—the time from which an account of the rents and profits ought to be taken; but I do not think that these petitions very fairly represent that, because the way in which they put that is this: They say that the applications to this House take no notice of the rents and profits. That is not so; because, if you look at the cases, and particularly the case as far as it affects Balfour's purchase, you will see, as to his purchases, the printed Cases expressly state, and no man can doubt as to that, that as to those an account of the rents and profits should be given. But the way in which it is fairly put is this: They say that the first question was, Whether the purchasers were liable at all? And that question being decided by the Court of Session in the negative, they then say, that the consequence of that was, that there was no occasion for your Lordships to address yourselves to the consideration of the consequential question, how they were to account for the rents and profits, if their purchases were set aside. Then it is said, it was not argued at the Bar here—that the question was not discussed—and that the regular course of proceeding would have been to have sent back the question to the Court of Session, and that they would have taken up the consequential question, having the opinion of the House of Lords upon the primary question; and that it would have been heard, and the decision of the Court of Session would

Mar. 12. 1823. have been founded upon that consequential question, and brought to this House.

Now I think I shall not step beyond what is just to myself when I say, that it has not been my habit to advise your Lordships to decide, in this House, in the first instance, points upon which the opinion of the Court of Session has not been taken; but I cannot admit it to be, nor do I admit it to be, out of the power of this House to do so; and it would be an extremely mischievous thing to say, that that shall be generally done in all cases. Suppose a bill were filed in the Court of Chancery here, to have a man declared the trustee of an estate, and calling upon him to account for the rents and profits, according to the principle known in equity: If the Court had said you are not a trustee, they would not trouble themselves with arguing the question as to the principle upon which, or the time at which, the account of the rents and profits was to be taken; but if that case came to this House, it would be in the discretion of this House whether it would decide that point or not, if it reversed the judgment of the Court below, which disclaimed him to be a trustee. So I take it to be open for the party here, where the matter is merely brought in the form of appeal. Whether it be a distinct mode of proceeding, or whether another mode of proceeding had not better be adopted, is another question; but the House, if it pleases, may decide that, if it is brought before it. I cannot agree with this petition, that the question has not been brought before it, because the application to the Court of Session, at the conclusion of the summons, is for reducing all these purchases, and for an account of the rents and profits received by any of the purchasers; and the interlocutor appealed from is an interlocutor which in form decides all questions, because, if you will look at it, it assoilzies the defenders from all the conclusions of the summons; therefore an appeal from an interlocutor assoilzieing the defenders from the whole conclusions of the summons, opens to us the discussion of the whole matter.

There is another circumstance, which, if we have been wrong in this, which I do not admit nor assert we have, tends to show the real apprehension in the minds of the gentlemen. We put it to the Bar whether we need trouble ourselves with that consequential question, and not a single syllable was said to us at the Bar upon the point. But there is something more to be said; because, unless my memory very much deceives me, we did take the trouble, after drawing out the judgment, of submitting that judgment to the perusal and inspection, and consideration and reconsideration of the agents; and I never heard one word of objection from anybody as to the amount of the rents and profits, as they were directed. There is a difficulty, therefore, which I confess I have upon that question, and it is the only point of the case upon which I would reserve myself for two days' more consideration; for as to rehearing the case upon the merits, that cannot be done; but as to that point of the rents and profits I shall desire two days' more consideration, looking upon it to be extremely dangerous (unless you can bring the consideration of that part of the case within the principles of some of those cases upon which, to a

limited extent, we have had rehearings) to allow those rehearings to take place. On the other hand, your Lordships will feel that it may become a matter of very dangerous precedent, that where it is open to parties to submit to the consideration of this House a particular point, upon an interlocutor so framed, that the House in its discretion may decide or not upon that particular point; it is extremely dangerous if the House is permitted to go to judgment upon the whole of the conclusions, and afterwards an application is to be made to your Lordships, by persons who had not instructed their counsel to state that originally which they now state, in order to stay the judgment. We are in great danger from that; and it is one strong feeling, and the only one I cannot immediately, and perhaps I never shall, be able finally to gratify—the feeling I have of regret, that it has been decided by the House, without hearing all that could be said upon it. The question turned upon this, whether these purchasers were purchasers malâ fide or bonâ fide. According to the circumstances now stated to us, perhaps more can be said showing that they were bonâ fide, than can be said that they were not; but it is of very great importance, and of so much value, that if we have got wrong for want of being put in the way of being right, we cannot help feeling regret; but we must take care not to carry that feeling so far as would endanger the general principles of the House. My clear opinion, as far as these petitions go as to the merits of the case, is, that the House cannot rehear the cause, whether the judgment be right or wrong. Mar. 12. 1823.

It was my intention, looking at those Scotch statutes, to have moved your Lordships to proceed to final judgment this morning in the case of Mr. Vans Agnew. In consequence of its having been intimated to me that there was a case referred to in the Journals of the House of Lords in Ireland, which bore upon the question, I have thought it right to refer to that case, and shall immediately state its effect.

LORD CHANCELLOR.—In respect of the application of Mr. Agnew, that the Court of Session should be ordered to carry your Lordships' judgment into effect, I feel persuaded, that when the Court of Session know what is the opinion of this House on the question of rehearing the cause, such a direction will not be necessary. I should have thought it more respectful to dismiss that petition, without making any order upon the subject. Upon the point of rehearing I have nothing further to observe, than that there appears to be an act of the Scottish Parliament, (which in truth only states, by the authority of Parliament, that which is founded in reason and common sense,) that no decisions passed in Parliament after consideration of a cause shall be called in question by any inferior Judge whatever. If that statute applies to the case, the enactment renders the judgment final; and it seems to me it cannot be necessary, even in point of respect or any other consideration, to make any order upon that petition.

With respect to the case from Ireland, it seems that in the year 1787 —I think in May 1787, according to the Journals of the House of Lords in Ireland—there was a case of Magrath v. Lord Muskerry heard before

Mar. 12. 1823. the House, on an appeal from the Court of Chancery in Ireland; and the question being put, that the decree of the Court of Chancery should be reversed, the further hearing of the cause was put off till Friday. Then, after hearing counsel, 'It is ordered and adjudged by the Lords Spiritual 'and Temporal in Parliament assembled, that the said petition of appeal 'be, and the same is hereby dismissed this House; and that the said de-'cree therein complained of be, and the same is hereby affirmed.' After this there was an application made by petition to the House of Lords in Ireland, praying that the petitioner's appeal might be reheard upon such day as to their Lordships should seem meet. The House proceeded to take into consideration that petition, and a motion was made, that the prayer of the petition be granted. A debate arising thereupon, and my Lord Lieutenant being present in the House, a motion was made, and the question being put to adjourn the debate for half an hour, it was resolved in the affirmative. After the Lord Lieutenant had left the House, the debate was resumed, and it seemed to have occurred to those who meant to support the prayer of the petition, that it was rather too much to move for rehearing the cause that the prayer of the petition should be granted generally; upon which it was moved that the original motion should be amended, by inserting after the word 'granted' the words following: 'Merely for the purpose of taking the opinion of the Judges upon 'the construction of the act commonly called the Tenantry Act, and for 'no other purpose whatever.' There was a debate upon that motion to amend the original motion, and, after long debate, it passed in the negative. Then the question being put upon the original motion that the cause should be reheard, the House resolved that the petition should be rejected; which shows that the House proceeded upon the ground, that at least for a century past it had not been the usage of Parliament to rehear a cause which had been heard upon the merits. The rule was thought not to apply where the House was in the habit of hearing causes by committee, and the committee reported to the House; for then they had not had the final judgment of the House. So, where parties were not before the House that were supposed to be before the House, and where notices had not been given that were supposed to have been given, or where there were errors in form, the House in such cases reheard the cause; but they have never reheard a cause, for a very long time past, where the cause had been heard upon the merits. There was a great deal of discussion upon the subject in a case in Ireland—a discussion that brings back to my mind a good deal which passed in the case of the impeachment of Mr. Hastings. It will be in your Lordships' recollection, that there were opinions, and very high opinions too, that a judicial proceeding dropped in consequence of a prorogation or dissolution of Parliament. One part of the argument, unless my memory deceive me, was, that formerly judicial as well as legislative proceedings used to drop by the prorogation or dissolution of Parliament. It was contended in the case to which I refer, that the word rehearing in our standing order (for there is the same standing order in the House of Lords in Ireland) meant the rehearing

of a cause which had been heard, and not decided; but taking it for the moment that that construction is not at all to be supported, still the question is, To what extent, and for what purposes, will the House rehear a cause—whether will it rehear it upon its merits? I conceive it will not. The report of the opinion there expressed ends with a passage which I will read to your Lordships, as it is a curious one: 'Respecting the obvious and proper point of the argument, this much I 'shall presume to say, that if causes were to be reheard, there would then 'be no end of decisions. This House would then be a House of plusieurs 'resorts, and not of dernier resort—a House of many applications, and 'not of final judgment; and the celebrated Latin epigram upon the 'tediousness and uncertainty of the Aulic Council at Spires might then 'be wrote over the front of this House, Lites ibi spirant, sed nunquam 'expirant.' Mar. 12. 1823.

Having stated these cases to your Lordships, there still remains the single consideration, what is to be done as to the account of the rents and profits from the period when these purchases were made? Whatever may be done in this case, it will be necessary to take care, by some proceeding in this House, that cases of that kind shall not happen again. The necessity of attending to that, and the circumstance of my having discovered the above case since we were last here on Friday, lead me humbly to propose to your Lordships to postpone the final judgment in this case until Wednesday next.

Lord Chancellor.—The question which remains to be disposed of in the case of Agnew *v.* Stewart, is that which relates to the liability of the purchasers to pay to Mr. Agnew the bygone rents and profits. It is urged in the petitions before your Lordships, that upon that question the parties have not been heard either in this House or the Court of Session, and that the Court of Session never decided that question. With respect to the latter statement, it was perfectly competent for this House, notwithstanding it had not been discussed in the Court below, to decide it, if it came before them. That there may be no mistake whatever with respect to the practice of this House in matters of this kind in future, it is my intention to embody this principle in a standing order;—I mean, that it is altogether in the discretion of this House whether they will not decide upon all collateral and consequential questions, although these collateral and consequential questions have not been discussed in the Court below. This, however, appears to me to have slipped through our fingers by surprise. It was not argued at the Bar; it was taken for granted to follow upon the decision of the principal question; it was not submitted, therefore, to us, whether the right to the rents and profits would or not admit of a question; and although I think it will not be proper to say one word that may go to bring into question that practice of the House, I certainly am very unwilling that the parties should be concluded upon a question that was no way discussed, and which they conceived would still be open to them. I hope that the terms of the judgment I have

Mar. 12. 1823. prepared will preserve whole the jurisdiction of this House with respect to the merits, guarding only against the effects of surprise; meaning, however, to take care that, by an order to be entered in the standing orders of the House, no such neglect shall again happen upon the part of those who are called upon to discuss the original question.

J. CHALMER,—FRASER,—SPOTTISWOODE and ROBERTSON,—Solicitors.

(*No Papers.*)

No. 58. GEORGE REID, Appellant.—*Wetherell—Lushington—Fullerton.*
JEAN LAING, Respondent.—*Gifford—Forsyth—Moncreiff.*

Marriage—Proof.—Circumstances under which it was held, (affirming the judgment of the Court of Session,) that a marriage had been constituted by a promise subsequente copulâ.

May 14. 1823. 2D DIVISION. Lord Robertson.

THE respondent Jean Laing, the daughter of a country labourer on the estate of Ratho-bank, the property of the appellant Mr. Reid, brought a declarator of marriage against him in 1817, stating, 'that for some years prior to the year 1808, George Reid, 'Esq. of Ratho-bank in the parish of Ratho and county of Edin-'burgh, made his addresses to the pursuer, professing the most 'sincere love and regard for her, and his purpose and intention 'of marrying the pursuer, which he frequently repeated, and 'thereby so far gained the pursuer's affection, that she consented 'to intermarry with him:'—that accordingly they exchanged written declarations of marriage on the 18th of October 1808, and that in consequence they had acted as man and wife, but that he now refused to acknowledge her as such; and therefore she concluded to have it found that they were lawfully married persons, and that he should be ordained to adhere to her as his lawful spouse. The document on which she libelled was thus expressed: 'I hereby engage to be a true, a faithful, a 'kind, and an affectionate husband to you, on conditions you 'are the same to me; and I further engage to show this to no 'person, and to make it known to nobody whatever, without 'your consent. (Signed) George Reid, October 18. 1808.'

In further support of this action, she produced a great number of letters from Mr. Reid, expressed in language of the warmest affection, and occasionally of extravagant enthusiasm; and she alleged that, on the faith that she was constituted his lawful wife,

she had, after the above declaration, admitted him to the privileges of a husband. May 14. 1822.

From that correspondence, and from the evidence taken in the course of the proceedings, it appeared that their intimacy had commenced in the year 1802, at which time she was a servant in the house of Mr. Reid. As his attentions to her were not agreeable to his mother and sisters, (who resided with him,) she engaged herself as a servant to a lady in Hope-street of Edinburgh, distant about six miles from Ratho-bank; and she alleged that, before going there, he gave her the above-written declaration, and that she at the same time delivered to him one of the same description—a fact which he admitted on oath. She remained in Hope-street from Martinmas 1808 till Martinmas 1811, during which period Mr. Reid frequently visited her, and sent numerous letters to her. In particular he wrote to her, that 'I 'am certainly much obliged to my dearest for her kind and inter- 'esting letter of Saturday last. Instead of making apologies, you 'made me proud by the way in which you addressed me. You 'speak of my faithfulness and constancy: Is it possible that I 'ever can forget the many sweet and anxious hours that have 'passed between us—the many strange adventures we have had— 'the many stratagems we have fallen on to meet together, in all 'of which we succeeded? Often do I gaze, with silent admiration, 'on the very spots where we met. Nay, the very windows from 'which you used to exchange looks with me, derive an addi- 'tional value from the recollection of the feelings they used to 'excite, and the lovely object they used to contain. The romantic 'idea of your looking at a certain hour from R——— window 'to me in my garden shall never be obliterated from my mind. 'I beheld your delightful vision to-day as I passed. I am to 'dine at Leith to-day, and intend leaving it at seven o'clock, so 'as to meet you at eight o'clock. I hope it will be convenient for 'you to see me at that time. I will be at the same place we met 'at before at eight, but wait till half past eight, in case I should 'be kept. Meantime, my dearest wife, I remain your unalterable,' &c. In another letter he addressed her thus:—'My dear sweet 'delightful creature, if it were possible, I am ten thousand times 'more attached to you than ever. I ask your pardon, if I did 'any thing to offend your feelings the last night. You well know 'that I feel doubly anything that hurts you. Your goodness, 'your sweetness, has raised you much higher indeed in my esti- 'mation. I hope you will give me a double display of your 'attachment to me to-morrow, and I certainly shall do the same

May 14. 1823. 'to you, &c. Farewell, my dearly beloved. Accept a few apples 'from your garden. Remember your husband,' &c.

After having passed a night with her in Hope-street, he wrote to her on the following morning:—'Night had withdrawn her 'sable curtain, and gloom had descended from the throne of 'nature, when I parted with my love. The stillness and magni- 'ficence of the scene—the silent abbeys—the spires appearing be- 'tween me and the horizon filled my mind with the most sublime 'ideas. I only wanted the company of the dear object of my 'affection to make me completely happy. In parting with you 'this morning, I forgot to fix the time I was to pass your way; I 'therefore write this on purpose to tell you I am to pass from 'eleven to a quarter past eleven o'clock; it will be as near eleven 'as I can.'

In another letter he wrote to her:—'As the hart panteth 'after water brooks in a desert land, so panteth my heart after 'thee, O my beloved! I sit down with mingled emotions of 'delight and sorrow to unbosom myself to my love, and to 'pour forth the anguish of my soul, torn with the most violent 'sensations of love, heightened by the thoughts of the darling 'object of all my wishes torn from my embraces, and placed 'at a cruel distance from my view—sometimes perplexed with 'the idea that, removed from my protection, she may be ex- 'posed to the rude attacks and insults of other men, and separ- 'ated from all the endearments which would result from the 'exercise of mutual affection between two congenial souls, framed 'and moulded by nature to make each other happy. Two 'such souls united, and living together with the most perfect 'unanimity of heart and sentiments, would enjoy happiness flow- 'ing from the reciprocal exchange of kind offices, and the con- 'stant exercise of sympathy, esteem, and love, which no human 'language can describe, nor the boldest imagination conceive. 'It is the absence of these pleasures, and the dread of those evils, 'which often drives happiness from my dwelling, and makes this 'world, without you, appear to me a wild chaos, a solitary desert.'

After proceeding for some time in the same terms, he concluded with making an appointment to meet her that night. In another letter which he wrote, to apologize for not being able to keep an appointment with her, he addressed her thus:—'My 'dear sweet Jane, I thought I should never have seen you yes- 'terday; at length, when I was going to depart, I beheld a figure 'approaching me, which at first sight I fancied akin to myself, 'but did not believe it was you, carrying the water-stoups, until

'you neared me, when, to my surprise, I beheld your dear and 'blooming face. You would think I looked shy; but the fact is, 'I was overpowered with astonishment, but durst not look kind, 'as your mother was at the door reconnoitring,' &c.—'Yes, I 'think the scene will be darkened, and the moon will cease to 'give her light, when you forsake me; at least I may say that both 'these orbs will cease to shine on me—the sun himself grow dim 'with age, and nature sink in years, when that event takes place. 'But no—it cannot be—it will not be. I never saw you look half 'so well, nor so stylish, in my life; you was uncommonly smart 'about the neck,' &c. May 14. 1823.

In reference, again, to another meeting which he had with her, he wrote, that 'we had a most divine evening, spent in 'a most amiable and enchanting manner, on Sunday; I will not 'soon forget it. Farewell, my beloved.' And on a similar occasion he again wrote to her, that 'after spending one of the most 'transporting nights of my life, I drove home in the most pleasant 'manner imaginable. The cocks were crowing, and already the 'distant hills were tinged by the glare of the morning's dawn. 'There was no moon-light, otherwise I would have called for you 'in the evening; but intend seeing you either on Tuesday or 'Wednesday next.'

After leaving the service of the lady in Hope-street, the pursuer, between 1811 and 1816, was in the service of different families in Edinburgh and its vicinity, and during that period Mr. Reid was in the habit of writing to her in the same manner, enjoining her to be faithful, and promising fidelity, and also visiting her repeatedly.

At last, in 1816, she became desirous to have their marriage solemnized; and he having expressed a wish to have it still kept secret, she wrote to him this letter:—'As you have concidered 'me your wife, I agree to a privet solemnizing our marag on 'Wednesday fortnight; and I concent to keep this agreement 'sectret till a reasonable tim, which I expect you to limit when 'you write on Wednesday. I remain your affect. wife, (signed) 'Jean Laing.

'If these lines do not meet your concent, I can give no other. 'I have no occasion to bind myself to a new misery. It is my 'earnest wish to look into your interest as much as my nown; 'and if it is to serve you any advantage for me to stay in my 'place for a short time, I am agreeable; but you must fix a time, 'for you may never find it convenit. I hope you will com for-'ward in honour on Wednesday fortnight; if not, you need not

May 14. 1823. 'pleed an other excuse, for I am in no ways entrested which way 'it gos; but at that time it will be settled.'

In defence against the action Mr. Reid pleaded,—1. That there was no proof of a de presenti consent to marriage; but that the mutual declarations and correspondence amounted only to a promise of marriage de futuro;—and, 2. That he denied that there had been any copula consequent upon that promise.

The Commissaries appointed Mr. Reid to be judicially examined, and thereafter appointed the pursuer to give in a condescendence of what she averred as to a copula having taken place. She accordingly stated, that, one night in November 1808, Mr. Reid had connexion with her in a house belonging to himself at Ratho. As to this, he admitted in his declaration that they had gone together into that house, which was not finished, and not inhabited—that there was no light in it—that they remained together an hour, or an hour and a half; but stated that the only freedom which he took with her, was 'kissing and that kind of 'thing.' She further alleged that he had connexion with her when she was residing in Hope-street; and accordingly two witnesses deponed that he was in the practice of visiting her often in the evenings, remaining with her the greater part of the night; and that, on one occasion in particular, the bed which was in the room where they were, had the appearance of having been slept in by two persons. She also averred that the same thing had occurred in the houses in which she was subsequently a servant; and he admitted in his declaration, that on one occasion 'he slept in 'bed there that night, and the pursuer was for some time with 'him in his bed-room, and sat with him upon the front of the bed 'for some time, but they did not lie down together, and she went 'away to her own bed before the declarant lay down;' and that there was no other person in the house.

The Commissaries decerned and declared in terms of the libel; and Mr. Reid having thereupon presented a bill of advocation, the Lord Ordinary, after advising with the Court, refused it; and to this judgment their Lordships adhered, on the 26th of June and 20th of November 1819. *

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* Not reported.—It is stated in the Respondent's Appeal Case, p. 5, that 'when 'the bill of advocation and answers were advised, the whole five Inner-House 'Judges were present. Four of the Judges stated, that, in their opinion, the case 'was attended with no sort of difficulty; that some argument might no doubt be 'made about the question, whether the expressions used in what are called the mar-

Against these judgments Mr. Reid appealed, and contended,— May 14. 1823.

1. That, in order to constitute marriage, there must be an actual de presenti consent immediately to enter into the marriage state, and from that moment to become husband and wife:—that if the expressions which are employed have reference to the future, then the document in which they are contained will amount merely to a promise of marriage; and that even although these expressions bear that a de presenti consent has been given, yet, unless uttered in facie ecclesiæ, their meaning may be controlled by other expressions, or by the circumstances under which they were uttered or written, and by the accompanying acts and deeds of the parties:—that, according to these principles, the declaration founded on was a mere promise, because it was prospective, bearing merely a promise '*to be* a true, faithful, and affectionate husband,' upon the condition that she would promise *to be* a faithful wife to him:—that, besides, there was a stipulation that this promise should not be made known to any one till a future period, thereby indicating that there was to be a future public matrimonial consent; so that the declaration could no more constitute marriage than an antenuptial contract, which invariably expressed a de presenti consent, but was not held to infer marriage, as it was the intention

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'riage lines, or acknowledgments of 1808, form or amount in strictness to a con-
'sent de presenti, or only to a promise of marriage; and that if the question rest-
'ed there, it might perhaps be proper to allow further discussion; but this was un-
'necessary, because from the evidence it was impossible to doubt the fact, that
'matrimonial intercourse had occurred between the parties; and therefore there
'was here proof of marriage constituted by a promise of marriage, copulâ subse-
'quente. One Judge, Lord Craigie, expressed shortly a different opinion, and in
'particular stated that he was not convinced concerning the existence of the ma-
'trimonial intercourse.' It is also mentioned, that 'when the cause came to be
'advised by the Court for the last time, the same majority of their Lordships again
'stated their opinion to remain unaltered, and no less clear than formerly. On this
'occasion Lord Craigie, who had formerly dissented from the opinion of the rest
'of the Judges, now stated that his own opinion was altered, and that his Lordship
'now entirely concurred with the rest of the Court. The presiding Judge there-
'upon remarked, that although he had rested his opinion on the clear proof of a
'promise of marriage subsequente copula, yet he by no means intended to say that
'the argument was ill founded—that there was evidence before the Court of mar-
'riage by consent de presenti—that all that had been said to the contrary amounted
'just to this, that in certain cases it had been held that such written acknowledg-
'ments of marriage may be counteracted by proof—that they were framed by the
'parties with the view merely of imposing upon the world, and not as a serious act
'between themselves, in relation to which they were truly in earnest; but that there
'was no authority for saying, that in any case it had been held that an acknow-
'ledgment in writing is not a conclusive form of constituting marriage, providing
'that, as in this case, the parties had acted seriously, and with a view to a matri-
'monial engagement.'

May 14. 1823. to solemnize it publicly:—that, supposing the words were capable of a de presenti interpretation, still they ought to be controlled by the terms of the subsequent correspondence, which was expressed more in the language of high-flown and enthusiastic courtship, than in that which is the usual style of correspondence between man and wife; and that accordingly her letter of 1816 was quite inconsistent with the idea of a marriage having actually taken place: And,—

2. That the evidence which had been produced of sexual intercourse was quite insufficient, and that it was contradicted by her own conduct; for she never pretended, throughout the whole correspondence, that she had any claim upon him as her husband, arising from such a circumstance.

To this it was answered,—

1. That the terms of the declaration were in themselves sufficiently explicit to establish a de presenti consent; and if any doubt existed, it was removed by the subsequent correspondence, in which he called her his 'dearest wife,' and subscribed himself as her 'affectionate husband:' And,—

2. That as it was unquestionably a promise, and there was conclusive evidence of subsequent connexion between them, a valid and binding marriage had been established.

The House of Lords 'ordered and adjudged, that the said 'petition and appeal be, and is hereby dismissed this House; and 'that the said interlocutors therein complained of be, and the 'same are hereby affirmed: And it is further ordered, that the 'appellant do pay or cause to be paid to the said respondent the 'sum of £350 for her costs in respect of the said appeal.'

LORD CHANCELLOR.—My Lords, the only question in this case is, Whether this judgment should be affirmed? After hearing the very able argument of the learned counsel for the appellant, the rule of the House would dispense with my troubling your Lordships at all, because I am perfectly clear that the decision which has been first given in the Consistory Court in Scotland, and which has been twice affirmed by the Judges of the Court of Session in Edinburgh—the learned persons forming the Consistory Court in Scotland, and the learned Judges of the Court of Session, being probably much better judges in this matter than I am,—is well founded, and ought to be affirmed.

My Lords, the case has been very justly stated to be a case such as, if the copula did not take place, probably never occurred in this world before; and I am persuaded I am pretty well founded in saying, that such a case, upon such a supposition, will never probably occur in this world again. I am not, therefore, much afraid of making a precedent. My

Lords, I agree perfectly with what has been stated, that we do not sit here as a Court to observe upon the moral or immoral conduct of any man; but, in discussing what we are to do in the matter of costs in the cause, we must look to what appears to have taken place, collecting what has taken place from the proceedings in the cause, and looking at the honesty and integrity with which the defence has been made. May 14. 1823.

Now, my Lords, the summons in this case is one which appears to me, I confess, to have enough of allegation in it. I need not read it to your Lordships; but it states generally that Mr. Reid (who has been represented, I think, at the Bar, at the period when this courtship, or whatever you may call it, first began, as nearer forty years than thirty,—this girl being at that time about eighteen or nineteen) made his visits, as the summons says, to the pursuer, professing the most sincere love, esteem, and regard for her,—(and, to be sure, if you are to judge from his letters, there are love, esteem, and regard for her strongly expressed, though, I am afraid, not very sincerely expressed,)—and his purpose and intention of marrying her, which he frequently repeated, and thereby so far gained the pursuer's affection, that she consented to intermarry with him, but that he was desirous that it should not be a public marriage; that the parties then solemnly agreed to accept each other as husband and wife, and owned and acknowledged each other as such in the course of the written correspondence which passed between them; that he insisted upon the pursuer's exchanging with him lines or written declarations of their marriage; and accordingly, upon the 18th of October 1808, they did interchange lines or written declarations of marriage; and the acknowledgment or declaration which he delivered to the pursuer is in these words—I will read them to your Lordships:—'I hereby engage to be a true, a faithful, 'a kind, and an affectionate husband to you, on conditions you are the 'same to me;' that is, if you are a faithful and affectionate wife, we are to suppose, under the same conditions: 'And I further engage to show 'this to no person, and to make it known to nobody whatever, without 'your consent.' This is signed 'George Reid,' and is dated the 18th of October 1808. I will call your Lordships' attention to what is said about that date in another part of the proceedings. The summons then proceeds to state that they conducted themselves as man and wife, and the defender oftentimes solemnly avowed and repeated to the pursuer the declaration contained in the holograph acknowledgment or declaration, not only verbally, but also in the course of a correspondence by letters which passed between the parties, and, as far as was consistent with the plan of secrecy laid down by him, cohabited with her, and so on. Then there is the usual prayer of such a summons.

Now, your Lordships will find that it is an admitted fact, that this gentleman did deliver to her a paper in the words which I have read, and it has the signature, as I understand, unquestionably of Mr. George Reid. The date, your Lordships will find from what I have to state hereafter, was probably affixed to this paper, not by him, but was, with a view which he seems to acknowledge, withheld from the paper. The summons

May 14. 1823. does not contain the statement of what was given by the woman to him, but we collect something from his examination as a haver, which examination, I take it, was made on the 29th November 1817, and in which, your Lordships will recollect, it did appear that when this woman wrote these letters to him, when she began to insist upon having their marriage publicly acknowledged or publicly celebrated, she then wrote to him, subscribing herself as being his affectionate wife; and it appears from the examination which I now have in my hand, that, from some of the letters in which she so subscribed herself, he had taken the pains to withdraw the subscription 'your affectionate wife;' and let it be recollected, now that it occurs to me to mention it, that, from the beginning to the end, the evidence seems to me to make it out most clearly that this person (in whatever character as to the present or the future he held himself out to her) meant to deceive and delude her mind,—now and then, however, slipping out something, (for the most cautious man may fall into a mistake of that kind);—for it is quite evident that he meant there should be no sufficient evidence of a marriage, or even of a promise of marriage, that should be binding upon him; and that accounts very much for the manner in which he has written two hundred letters. It is in evidence that two hundred letters were written; those which he received were carefully put up, so that nobody should see them, and a person taking that care of the letters written to him would not be very likely to write letters promptly and plainly avowing the situation of these parties. But, my Lords, he says he received at the same time—that is, in the year 1808—from the pursuer an acknowledgment of marriage. The words 'acknowledgment of marriage' may certainly be taken in two senses—either acknowledgment that a marriage had actually been made, or acknowledgment that there was a promise of marriage; and you must put a construction upon that, taking it together with that which can be stated to be evidence how the facts stood the one way or the other. This he states he destroyed at that time, or soon after. When I say it is to be taken the one way or the other, as the facts may enable us to decide, let it be remembered that it ought to be taken most strongly against him, if the paper which he gave to her will bear the construction that there was an acknowledgment of actual marriage. Your Lordships see, therefore, with respect to the paper the girl handed over to him, he took care immediately to destroy it. You will see by and by how he reasons with respect to the paper which he gave to her; but, before I come to that part of the case, give me leave to state what he says in his defences. He says in his defences, that he never paid his addresses to the pursuer by way of marriage. 'It is stated,' he says, 'in the summons, that the defender paid his addresses to the pursuer with the view of marriage, and 'that she consented thereto, and that the parties accepted each other as 'husband and wife. There is no foundation for this allegation; the defender never paid his addresses to the pursuer with the view of marriage.' Now, if the defender gave this acknowledgment and declaration,—whether it is an acknowledgment and declaration of present mar-

riage, or acknowledgment and declaration of future marriage,—it is at least an acknowledgment and declaration that was to lead her to think that he did pay his addresses to her with a view of marriage. But taking him to speak that which is the truth, if he did not pay his addresses to her with a view of marriage, with what view, I would ask, did he pay his addresses to her? That he did pay his addresses to her, and did pay his addresses with a warmth and affection of language that has hardly ever been paralleled, nobody can dispute. Had he no object in paying his addresses to her? If he says his object was not marrying when he paid his addresses to her, and if he did in point of fact pay his addresses to her, what conclusion are we to come to from the evidence with respect to his intent, but that very view with which these interlocutors appealed from have fixed him? May 14. 1823.

My Lords, if you look to the circumstances under which the girl received this paper, you will see that it appears she had at that time recovered from an indisposition, and that he states himself to be much obliged by the confidence she had reposed in him, and that it should be his constant study and care to do everything in his power to make her happy; and then he says:—'On the other side I send you a copy of what I in-'tend to write you, to see if it meet your approbation. You will observe 'I have added to it a clause, by which both parties are bound not to show 'it, nor tell it, without the consent of the other, to which I hope you have 'no objection.' Then the copy is in ipsissimis verbis the same with that engagement I have read. He gets in return from her a declaration which is called a contract of marriage, and which, according to his own account, he takes care immediately to destroy.

Then, when he comes to make his judicial declaration, let us see what he says he meant by delivering to her this acknowledgment and declaration from himself. When interrogated whether he ever said to the respondent that he considered her as his wife? he says, 'He may have done 'so in jest, but never said so to her seriously;' and the writing which I have before read to your Lordships being shown to him, he said, 'That 'writing is mine, excepting the date, and I gave it to her, but, as I think, 'not upon the 1st of October; the date, I think, has been put to this 'writing afterwards, and is not the right date. I did not conceive it to 'be binding, as it was neither addressed nor dated.' So that, upon that occasion, this gentleman receives a declaration from her, which she certainly meant to have some operation, either as an acknowledgment of marriage, or as a promise that there should be a future marriage. With a view to withdraw that evidence from the observation of human eyes, he destroys it; and with respect to that which he penned himself, as that which she is to rely upon, he takes care it shall be addressed to nobody, and that it shall not be dated; and therefore he places in her hands that which she was to think was an available instrument for either then creating, or in future creating the relation of husband and wife, but neither addressing it nor dating it; and he then says, 'As it was not addressed nor 'dated, I thought it would not be obligatory at all, nor of any use at all, 'no more than if I had never put it in her hands at all.'

May 14. 1823. My Lords, under these circumstances—putting now out of the question the relation of husband and wife—saying, however, that I confess I go a good way, if not the full length, with some of the learned Judges who consider this a promise de presenti,—but thinking it not necessary in this case to determine whether it is a promise de presenti or not, and coming to a conclusion which is inevitable upon this evidence, that if there was a promise of a future marriage, there has been that copula which, according to the law of Scotland, will constitute a perfect marriage. In expressing that opinion, we are to consider how the persons came together, and for what purpose he came together with her. That he paid his addresses to her, anybody who looks at these love-letters which I hold in my hand will find to be clearly made out. I believe there were two or three hundred of them. It might be very useful, perhaps, if this House were attended by ladies, to distribute them among them, that they might be put upon their guard against such insinuating addresses made to them. They might have been of some use perhaps last night.* He pays his addresses to her, giving her a paper which she was to look upon as an engagement to marry; but he says he made no promise to marry her at all. Then, in God's name, for what purpose did he make his addresses to her for six, seven, or eight years? Your Lordships find him meeting her in all secret places—taking her to plantations—(indeed the only answer that has been made to that is, that a plantation in Scotland is a thing that will hardly cover concubitus)—taking her to groves—taking her to empty houses—staying with her all night in empty houses—taking her into a laundry where there is a bed—he going to bed at night—she, as he admits, sitting on the bed all night. And your Lordships will find in the different letters that are printed, repeated statements that he had been with her all night—repeated applications that she might be with him all night; and yet this gentleman is supposed, under these circumstances, to be so virtuous and so Platonic a lover, as to express in his letters that he had passed with her the most transporting night he had ever passed with her in his life, while we are called upon to believe that nothing in the world had passed but the interesting conversation of this young woman with a man who never meant to marry her. I should like, by the way, to intimate to my excellent friend Dr. Lushington, that he should put into the book called De Matrimonio this case, by way of exception to all his doctrines; for he states, that if you have the tempus, the locus, and the kissing, and all those sort of things, you must therefore presume that there was sexual intercourse. Now, it seems a man may go on for eight years promising, though he does not mean to marry the woman—paying his addresses to her in the warmest possible language—stating himself that he would be her husband—making her believe that she was to be his wife—stating

* Several ladies had been in the House the preceding evening, at the debate upon a motion by Earl Grey.

that he is her husband—stating that she is his wife—meeting her—sitting up with her all night—(not, indeed, sitting up with her all night, but, according to his own acknowledgment, he lying in bed, and she sitting on the side of the bed by him)—and this in houses where there were no persons but themselves, except in the instances spoken to by a lady of the name of Forrester, and the other of the name of Leys;—and then Mr. Wetherell says—and that is really the only thing that he can say in a case of this sort, and there is no case in which he cannot say as much as anybody, and as ably—every thing he can say about that is, that he does not believe this lady. May 14. 1823.

My Lords, you must take all the evidence together in such a case as this. You must look at the purposes for which they came together, according to the man's own acknowledgment. You must take the whole history of the transactions during the eight years; and if Mrs. Forrester and Mrs. Leys speak to that, which I protest I think no man could doubt to have taken place, if there had been no such evidence, the transactions connected with their evidence give a credibility to the testimony; whilst, at the same time, their testimony introduces the considerations that are to be drawn from all the rest of the evidence, in such a manner that I think no man living can doubt that there must have been in this case a copula.

My Lords, it has been stated by Mr. Moncreiff, in a very able argument, that it is as well known in Scotland as possible what makes a marriage. I really think, however, there ought to be a sort of proclamation stuck up somewhere when an Englishman goes into Scotland. In all probability, this girl did not know that a copula would make a marriage. If she had so much knowledge of the law of Scotland;—if her head was full of all that learning which is to be found in Morison's Dictionary, page—I do not know how many hundreds or how many thousands;—if she meant to be his wife, and he was constantly telling her she should be his wife, it was the most likely thing in the world that it should take place—that the promise should be carried into effect. How it could be supposed that he would all this time resist the charms of this person, who was, according to him, the most charming individual who ever walked upon the face of the earth, it is exceedingly difficult for an Englishman to conceive. Whether in Scotland there is or is not that frigidity which Mr. Wetherell supposed to exist, when he could not be induced to believe whether or not there was a consummation of this business, I do not pretend to say; but I am sure that if your Lordships were not to pronounce in this case that there has been sexual intercourse, you ought immediately to undo, by act of Parliament, all the divorce bills you have passed, (for I protest I think this case the strongest case I have met with,) and to take care never to pass another in future.

My Lords, the nature of the defence, and the whole conduct of the defender taken together, are such, that as the Courts below—the Consistory Court in the first instance, and the Court of Session in the second—have given expenses, though I do not look to their example as affording

May 14. 1823. a rule on which we should proceed, because I observe they give expenses more regularly and uniformly than we do, yet I do think this is a case in which this man's wife—for such I take her to be—should be at no expense whatever; and therefore I am of opinion she should have the largest which the standing orders of this House will allow. Upon the whole I am of opinion that the judgments should be affirmed, the respondent having her costs and expenses as far as the standing orders of this House will permit, or so much out of the sum which the standing orders of the House will allow, as will be sufficient to pay all her expenses; and unless any of your Lordships happen to differ from me in the conclusions I have come to, I shall move that that be the judgment of the House.

Appellant's Authorities.—(1.)—1. Stair, 4. 26; 1. Ersk. 6. 3; Cameron, June 29. 1756, (12680); Johnstone, Nov. 18. 1766, (12681); M'Innes, Dec. 20. 1781, (12683); Hepburn, Nov. 18. 1785, (12686); Taylor, Feb. 16. 1786, (12687); M'Lauchlan, Dec. 6. 1796, (12693); Edmonston, May 15. 1804, (App. Proof, No. 1.); Macadam, March 4. 1807, (App. Proof, No. 5.)

Respondent's Authorities.—1. Ersk. 6. 2. and 5; 3. Ersk. 2. 22; Gordon v. Dalrymple, (Dodson's Report.)

C. Berry,—Spottiswoode and Robertson,—Solicitors.

(*Ap. Ca. No.* 12.)

No. 59.

Andrew Gordon, Appellant.—*Jeffrey—More.*

A. Bogle, for the Royal Bank of Scotland, Respondent.

Property—Statute 57. Geo. III. c. 53.—Held, ex parte, (reversing the judgment of the Court of Session,) that it is competent for the Dean of Guild of Edinburgh, under the above statute, to authorize proprietors of piazzas in Edinburgh to build them up.

June 4. 1823.

2d Division. Lord Reston.

The appellant Mr. Gordon was proprietor of a shop and cellar on the south side of the High street of Edinburgh, immediately to the west of the Royal Bank close. In front of the shop, and along the whole extent of the building, there was a piazza, with an area between the door of the shop and the foot pavement of the street. The property was thus described in the title-deeds:—'All and whole these two laigh booths, &c. upon 'the south side of the High street, a little above the Cross, upon 'the west side of the close formerly called the Master of Works 'close, now the west entry to the Royal Bank close, bounded 'between the lands sometime of Andrew Cooper of Fenton Barns; 'on the south; the lands sometime of Mr. John Adamson, advo-'cate, upon the west; the said close, of old called the Master of 'Works close, upon the east; and the High street of Edinburgh 'upon the north parts.'

Formerly the High street of Edinburgh contained a number of similar piazzas, under which passengers occasionally walked; and in 1783 the Court of Session found, in a case Forbes and Others v. Ronaldson, that they formed part of the public street, and that any member of the community was entitled to resist any encroachment upon them. In consequence of this decision, a clause was introduced into the police statute, 45th Geo. III. c. 21, empowering the Dean of Guild to authorize the proprietors of the respective tenements to build up these piazzas. When, however, this statute expired, and a new one, the 52d Geo. III. c. 172, was passed, this clause was omitted, as was alleged, per incuriam. June 4. 1823.

Mr. Gordon, being ignorant of this omission, applied to the Dean of Guild for authority to build up the piazza, and bring forward his shop, so as to be in a line with the pillars. This having been resisted by Mr. Bogle on behalf of the Royal Bank, whose property was in the immediate vicinity, the Dean of Guild found, 'that although, by the 29th section of the act 45th of the King, 'c. 21, it was declared lawful to this Court to authorize the proprie-'tors of shops and houses fronting the streets, situated in piazzas 'behind pillars, to bring forward their respective shops and houses 'to the front of the said pillars, so as to include the area of the 'said shops and houses; yet no application having been made to 'this Court by the petitioner Mr. Gordon during the subsist-'ence of the said act, and the same having been repealed by a 'subsequent statute, (the 52d of the King, c. 172,) commonly 'called the Police Act, the rights of the parties remain the same 'as before the first-mentioned act was passed; and therefore, in 'respect of the decision of the Court of Session in the case of 'Sir William Forbes v. Ronaldson, 3d March 1783, dismisses the 'present application.' After this decision was pronounced, a supplementary statute, 57th Geo. III. c. 53, was passed, by which power was given to the Dean of Guild, in reference to houses under which there were piazzas, 'to authorize the proprietors of 'shops and houses so situated as aforesaid, to bring forward the 'same to the front of the said pillars, so as to include the areas of 'the said piazzas, and recesses in the said shops and houses, and 'to alter the doors and windows of the said shops and houses, in 'order to give light and entry; but, in effecting these purposes, 'no encroachment shall in any case be made upon the streets, 'public entrances, and foot pavements.' After this statute was passed, Mr. Gordon again applied to the Dean of Guild for authority to build up the piazzas, which was resisted by Mr. Bogle, who contended that as it had been decided by the above case

June 4. 1823. that they formed part of the public street, and the statute declared that no encroachment should be made on the street, it was not competent to authorize them to be built up. The Dean of Guild, however, 'in respect of the terms of the act of Parliament founded 'on,' granted the warrant prayed for; and in an advocation, the Lord Ordinary, 'in respect that the intended alterations com-'plained of are sanctioned by the existing police act,' remitted simpliciter; but the Court altered, advocated the cause, and dismissed the original petition, 'in respect that by the police act 'no encroachment shall in any case be made upon the streets, 'public entrances, or foot pavements.' And to this interlocutor their Lordships adhered on the 21st of May 1819, by refusing a petition without answers. *

Mr. Gordon then appealed, and contended that by the terms of his title-deeds he had right to the whole area under the piazzas, extending to the foot pavement:—that by the statute 57th Geo. III. c. 53, authority was given to build up these piazzas; and therefore, that even if the areas could be considered as part of the public street, they thenceforth ceased to be so:—that the condition of not encroaching on the streets and foot pavements plainly applied, not to the area under the piazzas, but to that which was the usual and regular thoroughfare, and, in the proper acceptation of the word, the public streets, on which he did not mean to make any encroachment.

No appearance was made for Mr. Bogle, and the House of Lords 'ordered and adjudged, that the said interlocutors com-'plained of in the said appeal be, and the same are hereby re-'versed.'

J. RICHARDSON,—Solicitor.

(*Ap. Ca. No.* 18.)

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* Not reported.

CHARLES FERRIER, (GEORGE LYELL'S Trustee,) Appellant. No. 60.
—Gifford—Clerk—Bell.

JAMES MUDIE and JAMES FORD, Respondents.—*Cranstoun—Jameson.*

Sale—Latent Burden.—Circumstances under which it was held, (affirming the judgment of the Court of Session,) that a purchaser of an estate was entitled to be relieved of a latent burden created by a subtack, and which could not be discovered from the rights on which the tenants possessed.

June 9. 1823.

1ST DIVISION.

Lord Alloway.

GEORGE LYELL, proprietor of the estate of Kinneff and of the lands of Dickmontlaw, being involved in debt, executed a trust-disposition of his whole property in favour of John Colville, town-clerk of Arbroath, James Leach there, and Robert Jamieson, writer to the signet; any two to be a quorum.

After unsuccessfully exposing the lands of Dickmontlaw to sale by public roup at £20,000, an agreement was entered into between Colville and the respondent Ford for the purchase of the property. In reference to this, Colville wrote to Ford in these terms:—'As the only trustee of George Lyell, Esq. of Kinneff, 'now in this quarter, I do hereby make offer to you of the lands 'of Dickmontlaw at the sum of £18,000 sterling; your entry to 'be at Martinmas next 1812, at which term the price to be payable. On the said price being paid, I engage that you shall receive a proper and valid disposition at the expense of the said 'George Lyell's estate, and along therewith to deliver up a complete progress of writs, it being understood that the said trustees are to be entitled to the rents of crop 1812, and all preceding crops, whatever may be the conventional terms of payment 'thereof, it being always understood that the said lands are to 'be relieved of all encumbrances affecting the same at and preceding the term of your entry. Your answer in six days, if or 'not you accept this offer, is requested by,' &c. To this Ford made the following answer:—'I am favoured with yours of this 'date, making me offer of the estate of Dickmontlaw, provided 'it meets with Mr. Jamieson's approbation, at the sum of £18,000 'sterling, payable at Martinmas next, with right to crop 1813, 'you paying whole costs of disposition stamp; of which offer I 'hereby accept, provided it meets Mr. Mudie of Pitmuir's approbation.'

Mr. Jamieson having approved of, and Mr. Mudie having concurred in the transaction, a minute of sale was executed in April 1812, by which 'the said trustees hereby sell and dispone 'to and in favour of the said James Ford and James Mudie

June 9. 1823. 'equally, &c. all and whole the lands of Dickmontlaw, &c. to-'gether with all right, title, and interest which the said trustees, 'or the said George Lyell, have or can pretend to the said lands, 'teinds, and others. The trustees bind and oblige themselves 'and their successors in office, and the said George Lyell and 'his heirs and successors, duly and validly to infeft and seise the 'said James Ford and James Mudie,' &c. 'and to discharge all 'public and parochial burdens preceding that date, the said 'James Ford and James Mudie and their foresaids being liable 'for the same in all time thereafter,' &c.: 'Declaring hereby, that 'the said James Ford and James Mudie's entry to the premises 'is to be at the said term of Martinmas next in this present year '1812, they having right to crop 1813, and all crops thereafter. 'But it is hereby understood and declared that the creditors of 'the said George Lyell are to be entitled and have right to the 'rents of the said lands for crop 1812, and all preceding crops, 'whatever may be the conventional terms of payment thereof; 'and further, the said trustees bind and oblige the said George 'Lyell and his heirs and successors to warrant this minute of 'sale, and the conveyance to be granted in consequence thereof, 'at all hands, and against all deadly: And the said Robert Jamie-'son and John Colville bind and oblige themselves and their 'foresaids to warrant this minute of sale, and the conveyances to 'be granted in consequence thereof, from their proper facts and 'deeds, allenarly. For which causes, and on the other part, the 'said James Ford and James Mudie bind and oblige themselves, 'conjunctly and severally, their heirs, executors, and successors 'whomsoever, to content, pay, and deliver to the said Robert 'Jamieson and John Colville, a quorum of the trustees aforesaid, 'and their above written, the sum of £18,000 sterling for the 'foresaid lands and others, and that at the term of Martinmas 'next in this present year 1812, with interest,' &c.

The respondents having declined to pay the price, except under certain deductions, a charge was given to them, of which they brought a suspension, and inter alia stated that they had discovered, since the date of the sale, that there was a latent burden on the lands of a rent of £19. 19s., of which they had not been aware, and which they could not discover from the tacks or the rental which had been exhibited to them, and the history of which was of a very complicated nature. From their statement it appeared, that there were two farms on the estate called Gibraltar and Mains; and that in 1788 the former proprietor had let the farm of Gibraltar, at a rent of £111, to three tenants, for 57 years, and for the liferent of the heir-at-law of Alexander

Scott, one of the three tenants. In the same year these tenants subset two parks to Dr. Stevenson at a rent of £19. 19s. for 38 years, and the liferent of the tenant in possession. Thereafter, in 1791, Alexander Scott obtained right, by assignation from his co-tenants, to the lease of the farm. Scott then transferred it to Robert Lindsay, under whom Dr. Stevenson thus became subtenant of the two parks. This subtack was acquired from Dr. Stevenson by a Mr. Kirkaldy in 1801, who thus became bound to pay Lindsay the subrent of £19. 19s. In 1806 Lindsay entered into a transaction with the proprietor, Mr. Lyell, by which he renounced the original lease, and obtained a new one for a longer period at a rent of £171, and with power to draw from Kirkaldy the subrent of £19. 19s. In 1809, Mr. Lyell purchased right to this subtack from Kirkaldy, and thus became bound to pay the subrent of £19. 19s. to his own tenant Lindsay. At the same time he granted a lease of the other farm of Mains to Richard Howieson for £500, including in it the two parks which were held by sublease; but in the lease to Howieson it was stated that the whole were derived from Lyell as heritable proprietor of the lands, no distinction being made as to the two parks. From the respective tacks, therefore, of Lindsay and of Howieson, who were in possession of the lands at the date of the purchase, it appeared that the former was bound to pay a clear rent of £171, and the latter of £500. But Lindsay now claimed deduction out of his own rent of the subrent of £19. 19s., on the ground that Mr. Lyell was by the subtack bound to pay him that sum; or, which was the same thing, he claimed right to £19. 19s. of the rent payable by Howieson, as being in possession of the lands which had been so subset. June 9. 1823.

The respondents therefore contended, that as this was a transaction which did not appear on the face of the tacks—was one which they had no means of discovering,—and as no mention was made of it in the rental,—and the tack of Howieson proceeded on a statement which was not true, they were entitled, in terms of the stipulation in the missive of sale, and at common law, to be relieved of this burden.

On the other hand it was contended, that as they had bought the lands without any reference to a rental, and as it was their duty to have inquired into the state of possession, whether enjoyed under tacks or subtacks, they were not entitled to any deduction.

The Lord Ordinary, 'before answer as to the deduction of '£19. 19s. sterling, on account of the difference of rent payable 'by Lindsay, one of the tenants, in consequence of a sublease of 'part of his farm to another tenant—a transaction alleged not to

June 9. 1823. 'have been known or communicated to the purchaser,—ordained 'the chargers (Lyell's trustees) to give in a condescendence, in 'terms of the act of sederunt, of the facts they allege and offer 'to instruct, from which it is to be inferred that the purchasers 'knew or might have known of the alteration in the rent stated.'

Thereafter, on advising the condescendence with answers, his Lordship found, 'That the subjects in question were purchased 'by private sale, by missive and minute of sale entered into be- 'tween the trustees of Mr. Lyell and the suspenders, without 'having any reference to the articles of roup:—that by the leases 'it seems impossible to discover the deductions from Mr. Lindsay's 'rent, and which amount to £19. 19s., and it is not offered to be 'instructed that the suspenders were acquainted with the latent 'or confused transaction betwixt Mr. Lyell and his tenant by which 'this deduction could be claimed, and therefore found the sus- 'penders entitled to a deduction from the price corresponding to 'the £19. 19s.' To this interlocutor his Lordship adhered, 'in 'respect that the deduction claimed arose from a latent burden 'created by the proprietor having let to one tenant the lands 'which had been previously included in a lease to another te- 'nant, and for which he granted that tenant a deduction by way 'of subrent, and which, unless particularly explained, could 'neither have been discovered by the leases nor by the rental, 'and the chargers do not offer to instruct that it was explained, 'or that the purchasers were acquainted with it.' To these in- terlocutors the Court adhered on the 12th of January and 8th of June 1819.*

Thereafter, Mr. Lyell's estate having been sequestrated under the Bankrupt Act, and Mr. Ferrier having been appointed trustee, he entered an appeal; but the House of Lords 'ordered and ad- 'judged, that the said petition and appeal be, and is hereby dis- 'missed this House; and that the said interlocutors therein com- 'plained of be, and the same are hereby affirmed.'

Appellant's Authorities.—3. Erak. 2. 2; 4. Stair, 46. 21; 3. Erak. 3. 10; Lloyd, Feb. 13. 1782, (13334); Hannay, Jan. 26. 1785, (13334); Inglis, June 27. 1788, (13335); Urquhart, Feb. 8. 1769, (14163); Gray, Jan. 23. 1801, (No. 2. App. Sale); Murray, Jan. 26. 1815, (F. C.); Sugden, 275.

J. CAMPBELL,—J. CHALMER,—Solicitors.

(*Ap. Ca. No.* 14.)

* Not reported.

ADAM HUNTER, Appellant. No. 61.
Right Hon. ELIZABETH HUNTER of Polmood, and HUSBAND, Respondents.—*Gifford—Forbes.*

Service.—Held, ex parte, (affirming the judgment of the Court of Session,) That a service founded on by the appellant was null, being unsupported by evidence.

June 9. 1823.
2D DIVISION. Lord Robertson.

THE appellant Adam Hunter, tenant in Alterstane, having obtained himself served heir-male and heir-of-line of Robert Hunter of Polmood, raised an action of reduction of the titles under which the respondents held that estate. On the other hand, they brought a reduction of his service; and this being considered the prejudicial process, and entitled to take the lead, the other action was sisted. The case then resolved into a matter of evidence, and the Court, on the report of the Lord Ordinary, on the 18th of January 1814, reduced the service, and assoilzied the respondents.

Hunter then entered an appeal, but he lodged no Case; and the respondents having put in a Case, the House of Lords 'ordered 'and adjudged, that the said petition and appeal be, and is here-'by dismissed this House; and that the said interlocutors therein 'complained of be, and the same are hereby affirmed.'

SPOTTISWOODE and ROBERTSON,—Solicitors.

(*Ap. Ca. No.* 15.)

Sir WILLIAM RAE and Others, Petitioners.—*Gifford.* No. 62.
JAMES GIBSON-CRAIG, Esq. Respondent.—*Brougham.*

Jury Court—Stat. 55th Geo. III. c. 42.—59th Geo. III. c. 35.—Appeal.—Held incompetent, under the above statutes, to appeal against an order of the Jury Court to frame issues, and refusing to remit the case to the Court of Session on a point of law arising subsequent to a remit from that Court.

June 20. 1823.
JURY COURT.

SIR WILLIAM RAE, Lord Advocate, Mr. Solicitor-General Wedderburn, and several other gentlemen, subscribed a bond for a cash-credit in favour of a newspaper published in Edinburgh called The Beacon, which was printed by Duncan Stevenson, printer there, and was ostensibly conducted by one Nimmo, but of which Mr. Douglas Cheape was alleged to be the editor. In that newspaper repeated attacks of a personal nature had been made on Mr. Gibson-Craig, W. S., who, conceiving them to be of a libellous character, raised an action of damages against Mr. Stevenson as the printer, and Mr. Cheape as the author of them.

June 20. 1823. At the same time, and on the same ground on which this action was instituted, Mr. Gibson-Craig raised a separate summons against the Lord Advocate and the other gentlemen who had subscribed the bond. He there stated, that although Stevenson and Nimmo were the apparent conductors of the newspaper, 'yet persons of another 'description had been engaged in it as after mentioned, secretly 'combining, by contributions in money and otherwise, to support 'the said newspaper in its most wicked and nefarious attacks upon 'the pursuer: that in consequence of this combination, and 'immediately after or about the time of the publication of the first 'number of the foresaid newspaper, a bond of credit, for the express 'purpose of supporting and encouraging the Beacon, including the 'numbers of that publication in which the pursuer was libelled, 'was signed and lodged by the defenders: that in consequence of 'these facts, and of their general connexion with the foresaid 'Beacon, these persons have all and each, or one or other of them, 'made themselves responsible to the pursuer for the gross injury 'and insult that has been inflicted on him as aforesaid by the 'paper thus set up, encouraged and paid for by them;' and the summons therefore concluded against them for damages on account of those libels, on which damages were also demanded from Messrs. Stevenson and Cheape. The Lord Ordinary having remitted the case to the Jury Court, the defenders reclaimed; but the Court, on the 5th of February 1822, refused their petition as incompetent. * On the case being transmitted to the Jury Court, Mr. Gibson-Craig was appointed to lodge a condescendence of what he averred in support of his action, and the defenders to give in answers. A condescendence was accordingly lodged; but the defenders failed to give in their answers within the time prescribed.

In the mean while Mr. Cheape had compromised the action against him and Stevenson, so far as regarded himself, by paying costs; and a verdict was recovered against Stevenson for £500. The defenders in the other action then made a motion in the Jury Court, that as Mr. Gibson-Craig had recovered damages for the same injuries on which he founded in the action against them, he was not entitled also to obtain damages from them; and therefore that the action should be dismissed; or, at all events, it should be remitted back to the Court of Session to decide that point of law. Mr. Gibson-Craig at the same time moved that the clerks be directed forthwith to frame issues. The Jury Court, on the 28th of May 1823, pronounced this order:—'In respect the de-

* See 1. Shaw and Ball. No. 331.

'fenders do not now ask time to give in their answers, it is or- June 20, 1823.
'dered that the clerks do proceed to frame the issues on the first
'day of the next term, with or without answers; and that the
'motion on the part of the defenders is dismissed.' The defenders then presented a petition of appeal, which Mr. Gibson-Craig objected to as incompetent, on the ground that such an appeal was prohibited by the 55th Geo. III. c. 42, and 59th Geo. III. c. 35.

The House of Lords dismissed the petition as incompetent. *

LORD CHANCELLOR.—My Lords, in this case your Lordships have before you a petition of several persons, who are joined in one action, which was raised in October 1821 in the Court of Session in Scotland. In order that your Lordships may see what points are, and what are not before you, it seems to me it may be right to state from the petition itself what is the nature of the gravamen complained of in this appeal; because it is not a question with respect at all to the conduct of the parties—it is simply a question, I apprehend, whether, according to the true intent and meaning of acts of Parliament which were made in the 55th and 59th of the late King, there is any appeal to this House from certain proceedings which have taken place in the Jury Court in Scotland;—and your Lordships, therefore, may lay aside (as I am sure you will) the effect of every observation which has been made that furnishes any other view of the case.

The petition states, 'That in the month of October 1821 an action 'was raised in the Court of Session in Scotland.' That action was raised in the usual manner by a summons; and with respect to that summons it is only necessary to observe, that a summons in an action of damages is no more like a declaration in the Courts in England than any thing else which can be stated: 'Against these several appellants, that they 'ought and should be decerned and ordained, conjunctly and severally, 'by decree of the Lords of Council and Session, to make payment to 'the pursuer of the sum of £10,000 sterling, or such other sum, less or 'more, as should be modified by the said Lords, in name of damages, 'solatium, or compensation to the pursuer, for the injury he had sus-'tained or might sustain in his reputation, feelings, and interest, by and 'through certain false, scandalous, malicious, and unprovoked aspersions 'and calumnies therein set forth and contained in a weekly newspaper 'called the Beacon, and assisted, supported, and maintained by the ap-'pellants by secret pecuniary contributions and otherwise, in manner 'mentioned in the pursuer's summons; and also concluding that the 'appellants ought and should be decerned and ordained, by decree fore-'said, to make payment to the pursuer of the sum of £500 sterling, or 'such other sum, less or more, as should be found by the said Lords to

* No printed papers.

June 20. 1823. ' be the expenses of the process to follow thereon, over and above the ' dues of extracting the decree to be pronounced therein;—which sum- ' mons having come in the course of the rolls before Lord Alloway, Or- ' dinary, his Lordship, after hearing parties, pronounced this interloca- ' tor:—' Having heard parties' procurators, remits this process to the " Jury Court.' That the appellants presented a petition to the First ' Division of the Court of Session against the above interlocutor; upon ' advising which, with answers, they find the petition incompetent, and ' refuse the same. That prior thereto it was ordered by the Jury Court ' that the pursuer should lodge a condescendence of the grounds of his ' action, in terms of the act of sederunt, and of the facts he averred and ' offered to prove,'—a proceeding very proper on the part of the Jury Court, in order that that Court, with such assistance as it has, may frame an issue or issues calculated directly to do justice in the case. The Court is empowered to order a condescendence of the grounds of the action, in order to see what the issue ought to be,—a proceeding highly desirable, considering the extreme looseness with which actions are brought into the Court of Session. And I should rather wish that observation should be confined to the present case, than considered as an observation generally applying to summonses; for, having read the summons in this case, it does appear to me it will be extremely necessary you should have some explanation what were the transactions which that summons really meant to state.

Then the petition states, ' That thereafter an order was made by the ' said Court on the defenders to lodge answers thereto, and afterwards ' it was ordered by the Court that the parties in the case should revise ' their condescendence and answers; and it was ordered by the Court ' that the answers put in by the defenders be withdrawn, and that other ' answers be lodged, in terms of the act of sederunt, on or before the 23d ' day of November 1822. That thereafter notice was given by the pur- ' suer that the Court would be moved on Friday the 16th of May 1823, ' on his part, for a remit to the clerks to prepare an issue or issues in ' the cause, without answers for the appellants to the condescendence for ' the pursuer, in consequence of the appellants having failed to put in the ' said answers in the terms and within the space appointed by the Court. ' That notice was next day given to the pursuer that the Court would ' be moved on the 16th of May, on the part of the appellants, that the ' above process should be dismissed, in respect that the pursuer had al- ' ready obtained a verdict, and recovered damages from Duncan Steven- ' son, printer in Edinburgh, in an action raised,' as it is stated here, ' on ' account of the very same libel which was made the foundation of the ' action against the appellants; or that, at all events, the said process ' should be remitted back to the Court of Session, in consequence of ' certain questions of law arising out of the recovery of the verdict and ' damages,'—that is, the verdict and damages against Stevenson. ' That ' the above motions were heard on the said 16th day of May last, when ' the Jury Court delayed consideration of the case. That on the 29th

'of May last, the Jury Court having, on the motion of the pursuer, re- June 20. 1823.
'sumed consideration of the foresaid motions made on the 16th of May,
'the following order was, of this date, (28th May,) pronounced'—Your Lordships will observe, that the issues were directed to be tried without waiting for those answers, because the answers had not been filed in due time. The following order was pronounced:—'In respect the defenders 'do not now ask time to give in their answers, it is ordered that the 'clerks do proceed to frame the issues on the first day of the next term, 'with or without answers, and that the motion on the part of the de-'fenders is dismissed.'

Then, my Lords, this is the passage which states the gravamen that induces the parties to bring before your Lordships this appeal: 'That 'your petitioners are advised, and humbly conceive that the foresaid 'order or interlocutor of the Jury Court, dated 28th May last, is erro-'neous, and contrary to law and equity; and your petitioners being 'thereby aggrieved, humbly appeal from the same to your Lordships.' Then they pray that it may be the pleasure of your Lordships 'to re-'verse, vary, or alter the before-recited order or interlocutor of the Jury 'Court in Scotland complained of, and to grant the warrant for the usual 'summons upon the said James Gibson.'

My Lords, you will permit me here to observe, this is not an application to this House by appeal, or in any other form, complaining that the Court of Session remitted this to the Jury Court for trial. Whether the Court of Session were right or wrong in remitting this to the Jury Court, is not a question we have at all to deal with upon this petition; but the single question (if I understand the case before your Lordships) is this, Whether an appeal can be made to this House against the decision of the Jury Court, as pronounced in this interlocutor of the 28th May 1823? which is the only interlocutor appealed from. And the complaint which the petitioners allege is, that the Court did wrong in not directing the process to be dismissed, 'in respect that the pursuer had already ob-'tained a verdict, and recovered damages from Duncan Stevenson, 'printer in Edinburgh, in an action raised on account of the very same 'libel which was made the foundation of the action against the appel-'lants.' That is the first gravamen.

My Lords, with respect to the merits of the motion that was so dealt with by the Jury Court, I do not trouble your Lordships with any observations upon it, because it does not appear to me to be relevant at present before us. Nevertheless, as much conversation passed at the Bar upon this subject, and as it was suggested that, taking the Jury Court to be a Court carrying on the proceedings of the Court of Session, there may be circumstances between the commencement of the action and the time when the Jury Court is to try the question, which may put an end to the right of the pursuer in that action to recover any damages, I do not think it will be travelling much out of the way, with reference to the doctrine contended for by the Attorney-General, (which doctrine is resisted by Mr. Brougham,) namely, that the recovery against Stevenson is

June 20. 1823. a bar to this action, to say (and that is enough for my purpose) that nothing appears upon the face of this petition which can possibly prove that case; because, in the first place, it is stated that a verdict was recovered in an action raised on account of the very same libel, but it is not stated that it is an action raised on account of the same fact of publication of the libel, which is most material; because, if A. publishes a libel one day, and B. publishes the same libel another day,—or if A. publishes a libel in one place, and B. publishes the same libel in another place,—the publication on the one day or the other, or the publication in the one place or the other, may be under very different circumstances; and it is impossible to say, that because it happens to be a publication of the same libel, the recovering one verdict will be a bar to the action in respect of the other. I think also it will not escape your Lordships' observation, with reference to the question pressed by the Attorney-General, as to matters arising puis darrein continuance, how it happens, if that is intended to be insisted upon in this case, that we have not a single fact bearing upon that point brought forward; and if your Lordships will take the trouble of considering it for a moment, I will put this by way of illustration, to see how far it will operate. The summonses in the two actions are brought on the same day, but the cause of action is stated very differently in the one and in the other; and the papers that I have now in my hand are occupied in reasoning, not upon the mere injury that was done to this party by the publication by Stevenson and Cheape, (who are joined in one action,) but whether the ground of action be maintainable or not. That is a question upon which I do not presume to say a word. But the ground of action, the additional ground of action which is to be found in this other summons, is combination and conspiracy, to the extent mentioned in that summons, to do injury to this individual. There may not be one word of truth in that, or there may be a possibility of making out the assertion that there is a great deal of truth in it; but it is quite a distinct cause of action. If, therefore, we were to go into the merits, I do not see that we could by possibility pronounce it to be the same cause of action, 'or that at all events the process should be remitted back to 'the Court of Session, in consequence of certain questions of law arising 'out of the recovery of the said verdict and damages.' What those questions arising out of the recovery of the verdict and damages are, is no way explained to us; therefore we have not any certain ground on which we can proceed.

Under these circumstances another question arises, which certainly is a question of a great deal more importance,—namely, whether, in every case in which the Jury Court is conceived by parties not to have acted as it ought, the statutes have admitted of an appeal direct to the House of Lords from the decision of the Jury Court. In considering that the two acts of Parliament, 55th and 59th of the late King, have been referred to, I might here very well observe, that I do not see how it will be possible for the Jury Court to interfere in the action against Stevenson and Cheape, because the principal point that is insisted on in all these

papers, with respect to the ground of action against the present appellants, is alleged to be combination and conspiracy. Now, it is quite a different thing to make a particular publication, or by combination and confederacy procure or cause to be published generally a paper intended probably for publication. The summons does not confine itself to a particular publication, but states that there was this combination and confederacy for the general publication of this paper to injure the pursuer. Whether that is well founded or not, we have nothing at all to do with at present. June 20. 1823.

My Lords, it does, I confess, strike me that you have not conferred a very high boon on Scotland in the provisions you have made in respect of the Jury Court, if from every process before that Jury Court there is to be an appeal to this House. Taking it to be a fact—(which it is material to attend to on this petition of appeal)—taking that to be capable of being stated which has been stated at the Bar, that the Jury Court is to be considered as a Court continuing the proceedings of the Court of Session, and that for this purpose a part of it—and taking the law as it was stated at the Bar, that where an appeal is not given, you must still look at the general spirit of the acts, to see not only whether it is intended to be given, more particularly whether it be prohibited or not prohibited, and, if it is not prohibited, must consider it as being given,—the course of proceedings would, I think, appear not to be the most convenient for the administration of justice.

My Lords, the act of the 55th of the late King, after stating that either Division of the Court of Session shall be empowered to direct issues to be tried, states in the second section, 'That in all cases as aforesaid 'wherein a Lord Ordinary shall see cause for issues to be directed to be 'tried by a Jury, he shall take the cause verbally to report to the Divi-'sion of the Court to which such Division belongs, so that the Division 'may determine whether such issue shall be sent to the said Court to 'be tried by a Jury, or shall dispose of the cause in manner and form 'as at present practised' for that purpose; and the same power being given to the Judge of the Court of Admiralty, it is expressly enacted by the 4th section, 'That it shall not be competent, either by reclaiming 'petition or appeal to the House of Lords, to question any interlocutor 'granting or refusing such trial by Jury.'

Now, if the act had stopped there, I apprehend it would have been in vain to have argued that the Court of Session had directed issues in various cases in which perhaps your Lordships would not have directed issues, because it would have been an express prohibition to prevent any jurisdiction by way of appeal; and this having been foreseen, those who drew this act thought it necessary to advert to the cases where application was made for a new trial, and to the cases where there was question of relevancy, and where points of law might be brought before the Jury Court by bills of exception, which bills of exception, again, would be a species of conveyance, by which those points might be brought up from Scotland to this House. And accordingly the 6th section says, 'That in all cases in which an issue or issues shall have been directed 'to be tried by a Jury, it shall be lawful and competent for the party

June 20. 1823. 'who is dissatisfied with the verdict to apply to the Division of the Court 'of Session which directed the issue for a new trial, on the ground of 'the verdict being contrary to evidence,—on the ground of misdirection of 'the Judge,—on the ground of the undue admission or rejection of evi- 'dence,—on the ground of excess of damages, or of res noviter veniens 'ad notitiam, or for such other cause as is essential to the justice of the 'case; provided also, that such interlocutor granting or refusing a new 'trial shall not be subject to review by reclaiming petition, or by appeal 'to the House of Lords;' so that the interlocutor with respect to grant- ing or refusing a new trial was not to be subject to appeal, not only to the House of Lords, but even by reclaiming petition to the Court of Ses- sion. My Lords, I may here say it would be a very singular thing, if the Legislature had prohibited either a reclaiming petition or an appeal to the House of Lords, where the Court of Session had directed a trial by Jury, that the moment a cause was remitted to the Jury Court, the very first step taken by the Jury Court, and the very first step that could be taken in obedience to that remit, should be separately and distinctly a ground of appeal to this House; and yet that appears to be involved in the principle contended for, that the non-prohibition is in such cases equi- valent to a permission.

My Lords, this section having provided for the case of a new trial, 'That such interlocutor granting or refusing a new trial shall not be sub- 'ject to review by reclaiming petition, or by appeal to the House of Lords,' it was seen, however, that it might happen in the course of a trial (as in- deed it might happen before the matter was sent to a trial) that a great deal of matter of law might arise; and accordingly, as to what might arise in the course of the trial, there is this enactment: 'That it shall 'be competent to the counsel for any party, at the trial of any issue or 'issues, to except to the opinion and direction of the Judge or Judges 'before whom the same shall be tried, either as to the competency of 'witnesses, the admissibility of evidence, or other matter of law arising 'at the trial, and that on such exception being taken, the same shall 'be put in writing by the counsel for the party objecting, and signed 'by the Judge or Judges; but, notwithstanding the said exception, the 'trial shall proceed, and the Jury shall give a verdict therein for the 'pursuer or defender, and assess damages when necessary; and after the 'trial of every such issue or issues, the Judge who presided shall forth- 'with present the said exception, with the order or interlocutor directing 'such issue or issues, and a copy of the verdict of the Jury indorsed 'thereon, to the Division by which the said issue or issues were directed, 'which Division shall thereupon order the said exception to be heard in 'presence on or before the fourth sederunt day thereafter; and in case 'the said Division shall allow the said exception, they shall direct another 'Jury to be summoned for the trial of the said issue or issues; or if the 'exception shall be disallowed, the verdict shall be final and conclusive, 'as herein after mentioned: Providing always'—and this proviso was with a view of bringing the propriety of decisions of the Court in matters of law (where it might be thought desirable) to this House,—the trial of a

matter of fact being considered as final—'provided always, that it shall 'be competent to the party against whom any interlocutor shall be pro- 'nounced in the matter of exception to appeal from such interlocutor to 'the House of Lords, attaching a copy of exception to the petition of 'appeal certified by one of the Clerks of Session, so as such appeal shall 'be presented to the House of Lords within fourteen days after the in- 'terlocutor shall have been pronounced, if Parliament shall be then sit- 'ting, or if Parliament shall not be sitting, then within eight days after 'the commencement of the next session of Parliament, but not after- 'wards; and so as the proceedings on such appeal do conform in all 'respects to the rules and regulations respecting appeals; and every such 'appeal shall be appointed to be heard on or before the fourth cause- 'day after the time limited for laying the printed Cases in such appeal 'upon the table of the House of Lords; and upon the hearing of such 'appeal, the House of Lords shall give such judgment regarding the 'further proceedings, either by directing a new trial to be had, or other- 'wise, as the case may require.' Then it enacts, 'That if a new trial 'shall not be applied for, or shall be refused, or if the exception taken 'to the opinion and direction of the Judge or Judges shall be disal- 'lowed, the verdict shall be final and conclusive as to the fact or facts 'found by the Jury, and shall be so taken and considered by the Court 'of Session, or by the Judge-Admiral respectively, in pronouncing their 'judgment, and shall not be liable to be questioned any where; pro- 'vided, that in all cases wherein the Court shall pronounce a judgment 'in point of law, as applicable to or arising out of the finding by the ver- 'dict, it shall be lawful and competent for the party dissatisfied with the 'said judgment in point of law to bring the same under review either 'by representation, or reclaiming petition, or by appeal to the House of 'Lords, or where the Judge-Admiral shall have pronounced judgment in 'point of law on the verdict, it shall be lawful and competent for the 'party or parties to bring the same under the review of the Court of 'Session as heretofore.' June 20. 1823.

Your Lordships will observe, that the Court of Session may or may not direct issues of fact. If they direct an issue for trial, then the Jury Court is to frame the issue, and the order of the Jury Court for the trial cannot be made the subject of appeal to this House, or even of reclaiming petition. It appears also, that when the trial has taken place, there may be an application to the Court of Session for a new trial, in consequence of the Jury having miscarried with respect to the question of fact, and the Court of Session may, if they think proper, direct or refuse a new trial. If they direct a new trial, or if they refuse a new trial, there is no appeal to this House, in as much as it was the object of this act of Parliament to make the judgment of the Jury, confirmed by the judgment of the Court, final and conclusive as to matters of fact; but in as much as there might be in the course of the proceedings misdirection in matters of law by the Judge, the Legislature gave to the party an opportunity of bringing the question, whether the Judge had or had not misdirected the Jury,

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by bill of exceptions before the Court who directed the issue to be tried, if the judgment of the Division was wished upon it, and then it gave an appeal to this House.

There is another circumstance which is necessary to be attended to, which is this: Supposing a new trial to be refused, and that the Court, in consequence of the finding, shall pronounce a judgment in point of law which that finding would not be a valid and proper foundation for, then, if the Court mistakes in matter of law, in applying that law to the facts, there is likewise an appeal to this House; and if it stood only on this act of Parliament, it would be a very extraordinary thing to say that this act of Parliament, going through all this process from beginning to end, and which was intended to bring to conclusion a trial by Jury, meant that from every direction the Court gave with respect to the manner of bringing those issues before the Jury, there should be an appeal to this House, —that could not, I think, be the meaning of the Legislature.

Then there is likewise the 19th section, which is a material section, because it might have occurred that the issues which had been directed were issues that would not surround the whole of the case, or do justice to the case; or it might be an issue which, on appeal brought to this House, this House itself would not approve; and therefore, with a view to doing justice, if the demands of justice should require such a further proceeding on the part of this House, it is directed by the 19th section, 'That it 'shall be lawful for the House of Lords, in remitting to the Court of 'Session any cause which was or shall hereafter come before the said 'House by appeal from the Court of Session, to instruct the Division of 'the said Court of Session to which the cause is remitted, to order and 'direct such issue or issues as the said House shall think fit to be trans-'mitted to the said Commissioners, for the purpose of being tried by a 'Jury in manner directed by this act.' I do not think that in this long act there is any other clause which is material to be stated, and I confess I do not know how (supposing this petition to state the case more accurately and with more precision than it does) the doctrine these petitioners contend for could be maintained, so as to permit an appeal against an order practically carrying into effect the interlocutor of the Court of Session directing a trial, which the Jury Court must necessarily make, the Court of Session having a competency to direct such proceeding.

My Lords, the act of the 59th of the late King contains provisions which undoubtedly are very material on this subject, and particularly with reference to actions brought for damages. By the first section of that act it is enacted, 'That in all processes raised in the Outer House 'of the Court of Session, by ordinary action or otherwise, on account of 'injuries to the person, whether real or verbal, as assault or battery, libel 'or defamation, or on account of any injury to moveables, or to lands 'where the title is not in question, or on account of breach of promise of 'marriage, seduction, or adultery, or any action founded on delinquency 'of any kind, where the conclusion shall be for damages and expenses 'only, the Lord Ordinary of the Outer House, before whom such process

'shall be enrolled, do remit, and he is hereby authorized and required, June 20. 1823.
'after defences are lodged, to remit the whole process and productions
'forthwith to the Jury Court in civil causes, which last-mentioned Court
'is authorized and required, according to the rules and regulations which
'the said Court and the Court of Session are herein after empowered to
'make, to settle an issue or issues, and to try the same by a Jury to be
'summoned and impannelled under the provisions now in force, as herein
'after enacted for the purpose.' Then follows this clause: 'That if it
'shall appear to the parties, or either of them, that there is a question of
'law or relevancy which ought to be decided previous to the remit of the
'cause to the Jury Court, it shall be competent for them to state the
'same orally to the Lord Ordinary, who, if he thinks fit, may give judg-
'ment de plano, or order pleadings on the alleged question of law or re-
'levancy, and if he order pleadings, then the case is to be proceeded in
'according to the course of the Court of Session; and as soon as such
'question of law or relevancy shall be disposed of, if matters of fact re-
'main to be proved, the whole process and productions in the case shall
'be forthwith remitted to the Jury Court for the purposes aforesaid.'
Your Lordships, therefore, see that there is a provision with respect to what is to be done where there is a question of law or relevancy, which it is alleged ought to be decided previous to the further proceedings of the Jury Court; but then, with a view of bringing the matter to an end if possible, the third section says, 'That it shall be competent for the
'Lord Ordinary, if it shall appear to him that there is no question of law
'or relevancy which ought to be decided previous to the remit of the
'cause to the Jury Court, forthwith to order such cause to be remitted
'to the said Court for the purposes aforesaid; provided always, that it
'shall also be competent for the Lord Ordinary, if he sees cause, to re-
'serve the alleged question of law for the consideration of the Court of
'Session, after the matters of fact shall have been found by a Jury.' It would be saying too much for any Judge, however great his talents, to assert that his decision may not by possibility be wrong; but still it was thought for the interest of the public at large, that it was better the matter should come to an end; and the act directs, that 'in all such cases,
'the interlocutor of the Lord Ordinary ordering the cause to be remitted
'to the Jury Court, whether with or without the alleged question of law,
'shall not be subject to review by representation, petition, appeal to the
'House of Lords, or otherwise.'

There is then in this act also another very material clause. Your Lordships see that it gives an election as to the time of taking the opinion of the Judges of the Court of Session upon the question of the relevancy or not relevancy of any matter which may be alleged. In the 12th section it is enacted, 'That it shall be competent and lawful for the Jury
'Court, when it appears to the said Court, in the course of settling an issue
'or issues, or at any time before trial in the cases remitted to them as
'aforesaid, that there is a question or questions of law or relevancy that

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'ought to be previously decided, to remit the whole process and productions to the Division of the Court of Session, the Lord Ordinary, or Judge-Admiral, who remitted the same to the Jury Court, that the question or questions of law and relevancy may be considered and determined there: Provided always, that it shall be lawful to the said Division, Lord Ordinary, or Judge-Admiral, where matters of fact shall, after such consideration or determination, remain to be proved, again to remit the whole process, and all the productions, to the Jury Court, in order that an issue or issues may be prepared and tried as aforesaid: Provided further, that it shall be competent to the said Division and Lords Ordinary to prepare and settle an issue or issues, in manner aforesaid, for the purpose aforesaid; and it shall be competent for the Jury Court, when it appears to the said Court, in the course of settling an issue or issues, that a case turns upon matter of complicated accounts, or other matter to which trial by Jury is not beneficially applicable, to remit back the whole process and productions as aforesaid, with their report thereon, in order that the Division, Lord Ordinary, or Judge-Admiral may proceed with the same in such manner as shall appear to be most expedient for the administration of justice.' So that the two clauses taken together appear to me to prove that the parties may apply to the Lord Ordinary, or the Division, with a view to have matters of relevancy, and so on, settled; that if the Lord Ordinary shall be of opinion to send it to the Jury without deciding those matters of relevancy or law, he has the power finally and conclusively so to do; and that the Legislature never meant that if it should happen, upon due consideration in the Jury Court, that they should be of opinion there was some matter of law or matter of relevancy that ought to be considered, or ought not to be considered, the question whether they decided right or wrong was to be the subject of an appeal to this House, but that it was to be the subject of an application for a remit to the Court or the Ordinary for their decision on the question as to the matter of relevancy or law.

My Lords, then there is a declaration in the 15th section, 'That it shall not be competent, by representation, reclaiming petition, bill of advocation, appeal to the House of Lords, or otherwise, to bring under review any interlocutor by the said Divisions, Lords Ordinary, or Judge of the Admiralty, ordering a trial by the Jury.'

Your Lordships will recollect that the 12th section admits the power of the Court of Session to interfere for the purposes of justice, on the application of the Jury Court, at any time before trial; but from the interlocutor of the Court of Session ordering a trial by Jury there is to be no appeal, nor from the determination on a motion for a new trial. A bill of exceptions may in certain cases be tendered, and from the decision upon that, or from a judgment in matter of law, a power of appeal is given.

The question, then, upon the whole, my Lords, is this—a question which perhaps it is not very necessary to decide upon in this appeal—it is too important a question to be disposed of by merely adverting to the circum-

stances which are stated in this petition of appeal; because, even admitting the doctrine which was so powerfully stated by the Attorney-General at the Bar, namely, that in the Court of Session, as in England, it might happen that something might have taken place between the institution of the action and the trial, and even after the plea pleaded, which might put an end to the action, here there is no such thing stated; and if you look at the nature of the issues, which in all probability will be framed by the Jury Court, (for, by the way, no issues are yet framed by the Jury Court,) it may never be that any issue may be framed by the Jury Court which can be complained of. If no complaint can be made, except that in an action against A. there have been damages recovered against A.; if that be stated without other circumstances than the recovery against A. for the publication of a libel—a publication of the same libel, if you please,—how can the mere statement of that be a ground for staying the proceedings in a second action which imputes a combination and conspiracy, carrying on by joining in instruments and so on, agreeing to be general publishers of a paper in which that criminal matter which was the foundation of the recovery against A. happened to be inserted? It does not appear it is the same fact of publication; there may be a publication of the same libel, which may afford quite a different cause of action against A. and against B. perfectly distinct. Suppose, for instance, a man published a newspaper in London, with an express prohibition of that newspaper being sent out of London by any person he employed; if any other person thought proper to go and publish that newspaper in Liverpool and Edinburgh, and all the great towns in the country, that would be quite another cause of action, and a foundation probably for much greater damages than against the first individual. Your Lordships recollect the circumstance of a noble Lord publishing that which he had said in this House, reflecting on the character of an individual. The Court of King's Bench said they would never take notice of any thing said in this House; but if a noble Lord chose to publish his speech in the newspaper, that, if libellous, is not protected by any privilege whatever belonging to this House. Suppose a body of men had confederated together to give circulation to this libel, is it to be contended that that is a question that is to be shut out from the consideration of a Court? I do not say what they are to do with it; but is it a question to be shut out of the consideration of a Court of Justice, whether a man may not complain of the damage he has received from such a combination, or, as we should call it, such a conspiracy?

June 20. 1823.

My Lords, I desire only further to say this, that the simple question before us is, Can we proceed upon this appeal from that interlocutor of the Jury Court which is referred to in the petition of appeal? We have nothing to do with the conduct of the parties. The complaint may be justly founded, or, on the other hand, there may not be the least pretence to say there is any ground of complaint whatever; but the true question before us is, Whether, in this petition, in which the facts are not brought

June 20. 1823. forward, in which nothing is brought before us that would enable us to argue, even if we had the power of an appeal from the interlocutor, whether this would be brought within the principles upon which a matter, arising after the last continuance, as we call it in our proceedings, could or could not be a bar to the action brought? I say there is no statement enabling us to judge of that; the single question is, Have we the right, on that which is here stated, to stop the proceedings in the Jury Court? My opinion, my Lords, is, that your Lordships have no such right, and that therefore this appeal ought to be dismissed.

No. 63.

WILLIAM WHITE, Appellant.—*Clerk—Cockburn.*
ROBERT BALLANTYNE of Phaap, Respondent.—*Warren—Abercromby.*

Facility—Fraud—Reduction.—Circumstances in which it was held, (reversing the judgment of the Court of Session,) That it was necessary to show that a deed executed by a party who was proved to have been naturally weak in intellect and facile, but who was legally capable of making a deed, fully understood it: and this not being done, that the deed was reducible.

June 20. 1823. 1ST DIVISION. Lords Balgray and Cringletie.

WILLIAM WHITE, the nephew and heir-at-law of the late John Dalgleish, proprietor of certain lands and heritable subjects, brought an action of reduction of a deed of settlement, which Dalgleish had executed on the 3d of February 1808, and by which he conveyed these subjects to the respondent Robert Ballantyne. The grounds on which he made this demand were,—

1. That Dalgleish, from his state of mind, was totally incapable of making such a deed: And,—

2. That, at all events, it had been obtained by gross fraud and circumvention on the part of Ballantyne.

In support of this action he stated, that John Dalgleish had, from his earliest years, been afflicted with mental imbecility, and was unfit to manage his own affairs:—that he had been originally a herd, and had at one time obtained by means of his friends a farm, but was found to be unable from mental incapacity to attend to it:—that his brother, who was a clergyman, and was possessed of considerable property, became desirous that he should be placed in a situation where he might be properly attended to, and that accordingly he was boarded in the house of Ballantyne at Dryhope:—that, by the death of his brother the clergyman, John Dalgleish succeeded to the subjects in question, and to personal funds, amounting in all to about

£7000:—that while he was residing with Ballantyne, a Mr. Cairns, who was a writer, was sent for to make out John Dalgleish's deed of settlement, and that Dalgleish had given instructions that the land should be conveyed to David Ballantyne, whereas the deed had been made out in favour of the respondent Robert Ballantyne; and therefore, as it was not agreeable to his intention, it could not be regarded as his deed of settlement; and as he must be thus held to have died intestate quoad hoc, the land fell to White as his heir-at-law. June 20. 1823.

A proof having been allowed, Cairns was examined as a witness in relation to the circumstances under which the deed had been executed. He deponed, that on the 3d of February 1808 he went to Dryhope, but that the respondent Ballantyne was not at home:—that he remained to dinner, 'and that after dinner the 'deponent went up stairs to a room where there was a fire, and 'where he found John Dalgleish:—that John Dalgleish told the 'deponent that he wanted to make his will:—that the deponent 'asked him to condescend upon the particulars, and the deponent took a piece of paper and jotted down the particulars dictated 'by Mr. Dalgleish:—that they were a considerable time about 'it, Mr. Dalgleish taking some time to recollect all his relations, 'as he said he was to give to every one a share,' &c.; and that on that afternoon the deponent extended a settlement on stamp paper from these jottings in the house of Dryhope. That jotting was in these terms:—'John Dalgleish appoints Mr. Ballantyne 'of Phaap his executor, burdened with his debts and funeral ex-'penses,—the land to Mr. David Ballantyne, £100 to William 'White, baker, London;' and then there followed a number of legacies of the same amount to different parties, 'with £300 to 'Mr. David Ballantyne besides the land.' In the deed of settlement, however, the lands, instead of being conveyed to David Ballantyne, were disponed to the respondent Robert Ballantyne.

In defence against this action the respondent stated, That although John Dalgleish was somewhat weak in his intellects, yet he was perfectly capable of making a valid deed:—that the reason why Cairns had not framed it according to the jotting was, that he had not the title-deeds at hand, nor more than one sheet of stamped paper, which would have been necessary, if a separate disposition of the lands had been executed:—that as the respondent was nominated the executor, Cairns made out the deed generally in his favour, burdened with the legacies, and explained to John Dalgleish that he would take a back letter from the respondent, binding him to convey the lands to David Ballantyne;

June 20. 1823. and that accordingly, on the 17th September 1808, the respondent addressed the following letter to John Dalgleish, and delivered it to Cairns:—'As I understand that by disposition and assigna-'tion, dated the 3d day of February 1808, granted by you to me as 'executor, with the burden of certain legacies therein mentioned, 'you also dispone to me all and whole these two pieces of land, 'the one lying in the Bridgelands of Peebles, and acquired by 'your brother, the late Dr. Dalgleish, from John Deans, and the 'other lying in the Kirklands of Peebles, and likewise acquired 'by him from John Baird, bounded and described as particularly 'mentioned in the title-deeds thereof; and as you declare that it 'was your intention to have disponed these two pieces of land to 'David Ballantyne, my brother, but which could not be properly 'done at the time for want of the title-deeds to give a particular 'description of the lands, I hereby bind and oblige myself and 'my heirs, if the disposition and assignation granted by you to 'me stands unaltered at your death, to grant to the said David 'Ballantyne, immediately on that event, a valid disposition to 'said two pieces of land, in order that your intentions may be 'fulfilled. I am,' &c. The Lord Ordinary, on advising the proof, reported the case to the Court, 'in respect that the case is of 'considerable importance to the parties, and that the evidence 'regarding the capacity of the granter of the deed is contradictory.' On advising informations, the Court, on the 21st January 1814, repelled the reasons of reduction, and assoilzied the defender.*

White having appealed against this judgment, the House of Lords, on the 17th June 1817, ordered and adjudged, 'That it 'is established in this cause that John Dalgleish was of under-'standing and capacity sufficient to enable him to execute a set-'tlement of his property, if he should be duly and fully informed 'of the nature and effect hereof; and it is ordered that, with this 'declaration, the cause be remitted back to the Court of Session 'in Scotland to review the interlocutors complained of in the 'said appeal, having regard to all the circumstances of this case, 'and having more especial regard, as far as the Court's forms of 'proceedings will admit, to the facts and circumstances following, 'viz. To the fact that the jottings respecting John Dalgleish's 'settlement contain the following words:—'The land to Mr. "David Ballantyne,' and '£300 to Mr. David Ballantyne be-"sides the land;'—the fact that the settlement, nevertheless, con-'taining a disposition of £300 to David Ballantyne, contains no

* Not reported.

'disposition of land to him;—the fact, that the reason given by June 20. 1823.
'Mr. James Cairns in his testimony why he made the disposition
'of the heritage general is, that he had not at that time by him
'John Dalgleish's title-deeds;—the fact, that the description of
'the two pieces of land described in the letter of September 1808,
'herein after mentioned, is, nevertheless, nearly in the very same
'words as those which contain the description of two pieces of
'land described in the settlement of February 1808;—the fact,
'that the settlement, the validity of which is in question in this
'cause, bears date on the 2d February 1808, by which lands,
'and those two pieces of land, are given not to David, but to
'Robert Ballantyne;—the fact, that the letter addressed by
'Robert to John Dalgleish, containing the obligation to grant
'the two pieces of land to David Ballantyne, does not bear date
'till September 1808, although the settlement bears date in Feb-
'ruary 1808, being more than seven months after the date of
'the settlement;—to the circumstance, that it seems to be totally
'unexplained for what reason no such letter was written until
'the month of September, although the settlement was exe-
'cuted in the previous month of February; and to the cir-
'cumstance, that it does not seem to appear how far John Dal-
'gleish was or was not informed of what would have been the
'effect of the settlement of the month of February, in case his
'death had happened before the month of September; and it is
'further ordered, that, after reviewing the said interlocutors, the
'said Court do and decern as to the Court shall seem meet.' In consequence of this remit, Lord Cringletie (before whom the case now came) appointed Ballantyne to give in a condescendence of what he averred, in explanation of the circumstances stated in the judgment of the House of Lords. In that condescendence he in substance gave the same statement as he had formerly done, which he offered to prove by the evidence of Cairns. On advising that condescendence with answers, the Lord Ordinary, 'for the rea-
'sons fully explained in the foregoing note, recalled the interlo-
'cutor complained of by the pursuer,' and reduced and decerned in terms of the libel. The reasons on which his Lordship proceeded were thus stated in the note alluded to:—'The Lord Or-
'dinary having perused the former procedure in this cause, to en-
'able him to understand the subject now under consideration of
'this Court, sees that the House of Lords has declared itself satis-
'fied that John Dalgleish had capacity sufficient to make a settle-
'ment of his estate, but has not seen reason to believe, that in
'making the deed under challenge he was aware of its import, and
'has therefore remitted to this Court to investigate the subject

June 20. 1823. 'which embraces these topics of inquiry.—1st, Why the settlement 'executed by John Dalgleish, dated the 3d February 1808, bestows 'on David Ballantyne a legacy of £300, when, by the instructions 'given to Mr. Cairns, the writer of the deed, that legacy was to 'be given, and over and above it the land to which John had suc- 'ceeded as heir to his brother, the Rev. Dr. Dalgleish? And why 'that land was not given to David, as ordered by the testator, but 'was disponed to Robert Ballantyne, the defender, in opposition 'to the instructions? Is this sufficiently accounted for by the rea- 'son assigned by Mr. Cairns, viz. that he had not the title-deeds 'by him when he wrote the settlement, when the settlement con- 'tains a description of these lands, and at the distance of seven 'months, (September 1808,) Robert Ballantyne wrote to John 'Dalgleish a letter obliging himself to convey the lands to David, 'and in that letter described them in the same way they were de- 'scribed in the settlement.

'The inference from this seems to be twofold, on which the 'Lord Chancellor desires to be satisfied.

'1st, Could not Mr. Cairns have made John Dalgleish convey 'these lands to David in the settlement in February 1808 by a 'general disposition, as well as he conveyed them to Robert? 'And,

'2d, Could not, and ought not, Mr. Cairns to have declared Ro- 'bert to be a trustee only for David as to these lands, and ordered 'him to convey them to David; or at least ought he not to have 'taken from Robert a letter in February 1808, similar to that which 'Robert wrote to John Dalgleish in the following September?

'2dly, The Lord Chancellor wishes to have it explained why Robert Ballantyne delayed granting said letter from February till September 1808; and whether John Dalgleish was or was 'not, during all that period, aware that the effect of his settle- 'ment was to convey to Robert what he intended for David.

'In obedience to this remit, the Lord Ordinary appointed the 'defender to give in a condescendence, and the pursuer to answer 'it; which having been done, he will now explain to the parties 'what appears to him on the subject.

'In article 1st of the condescendence it is stated, that John Dal- 'gleish was informed that the land intended for David was actually 'conveyed to Robert Ballantyne, and was satisfied that, notwith- 'standing of this deviation, his intention would be carried into 'execution.

'In article 2d it is said that Mr. Cairns was instructed to com- 'municate to Robert this confidence reposed in him, and did com- 'municate it accordingly, and was satisfied, that, in consequence

'of this communication, the land was as safe to David as if it June 20. 1823.
'had been conveyed to him.

'3d, That Mr. Cairns did not make the defender write the letter 'declaring the trust till September, because he had not a proper 'opportunity of doing so till that time, when the defender came 'to Mr. Cairns' office, where the letter was taken.

'4th, That Mr. Cairns' reason for making the conveyance a 'general one was the want of the titles; and his reason for not 'disponing the land to David was the want of a sheet of 'stamped paper: 'For to have conveyed the land to David, and "every thing else to Robert, would have required either two "deeds, or a single deed that would have consisted of more words "than could by law be written on one sheet.'

'To these articles the condescendence avows that Mr. Cairns is 'the only witness; and the Lord Ordinary having read Mr. Cairns' 'former deposition, considers the testimony thus offered to be 'totally inadmissible. For Mr. Cairns swears, in his deposition 'formerly emitted, 'That he did not see Mr. Ballantyne on the "occasion when he made John Dalgleish's settlement, either on "that day or on the morning before he left Dryhope: That he "never afterwards communicated to him the import of that settle-"ment, nor did he ever ask about it.' At what time, then, did 'Mr. Cairns make the communication to Mr. Ballantyne of the 'confidence reposed in him? He did not do so in the evening when 'the settlement was made; and although it is now said that he was 'desired to do so, he left the house next morning without doing it, 'nor did he do so at any after time. On looking at the letter 17th 'September 1808 by Robert Ballantyne, it appears to be addressed 'to John Dalgleish; it is dated at Dryhope; it bears the com-'munication of the nature of John's settlement to have been made 'by himself; and as he desired the declaration of trust, so it was 'granted to him. All this is consistent with Mr. Cairns' deposi-'tion, that he never opened his mouth to Robert Ballantyne on 'the import of the settlement; but now, in the condescendence, 'the defender wishes to make Mr. Cairns not only communicate 'the nature of the settlement, but be the person who took that 'letter from Robert Ballantyne, and that, too, in his own office at 'Peebles, in opposition to the fact of its being dated at Dryhope. 'Mr. Cairns' former deposition must have been overlooked, other-'wise the defender could not now propose to call him to contra-'dict it; nor can the Lord Ordinary suffer this to be done, and 'as little can he believe that Mr. Cairns could do so.

'2dly, It is quite common in settlements of a man's affairs to 'dispone one subject, although heritable, to one person, and

June 20. 1823. 'another to a different person. But admitting that this may be 'against the stamp law, or that Mr. Cairns thought so, it is im- 'possible, with his intelligence, that he did not know that he could 'have made John Dalgleish dispone these parks which he describes 'in the settlement to Robert Ballantyne, in trust for David, and 'appointed him to convey them to David. It was surely equally 'competent to have made him a trustee in the land as one in the 'money, and to bind him to dispone that land to David, as well 'as to pay him a share of the money; but not only is this not 'done, but Mr. Cairns left the house without seeing Mr. Bal- 'lantyne, or taking from him the letter, which was taken at the 'distance of seven months; and the reason for taking which is not 'yet explained, though an attempt is made to account for the 'delay in taking it.

'Article 6th is expressed with perplexity; but if the Lord Or- 'dinary understands the meaning, it is evidently also inconsistent 'with article 4th, wherein it is said that Mr. Cairns had only one 'sheet of stamped paper by him in February 1808; and that to 'have conveyed the subjects to David would have required either 'two deeds, or a single deed that would have consisted of more 'words than could by law be written on one sheet. In article 6th 'it is said that if Mr. Cairns had been possessed of the title-deeds, 'he would have so framed the settlement in February 1808, as "to have disponed the various subjects specially, and to have "contained the necessary warrants for completing the disponee's "title.' Now, although he had been in possession of the titles, 'yet, as he had but one sheet of stamped paper, this could not 'have been done, if article 4th be correct. But Mr. Cairns' 'memory was correct enough to have enabled him to write any 'conveyance without the title-deeds, since the description in the 'settlement, and in the letter in September 1808, is quite sufficient 'to have conveyed the subjects.

'In short, when Mr. Cairns' former deposition is kept in view— 'when the circumstances on which the Lord Chancellor desires 'explanation are considered, and the whole compared with the pre- 'sent condescendence and the offer of proof it contains, it appears 'to the Lord Ordinary, that as the testimony of Mr. Cairns is the 'only evidence which the defender has to offer, it is quite inad- 'missible; and as it distinctly appears that if the facts, to investi- 'gate which the remit was made by the House of Lords, should 'not be satisfactorily explained, it was the opinion of that Right 'Honourable House that the interlocutors appealed from should 'be altered,—the Lord Ordinary alters these interlocutors, and 'reduces the settlement.'

Against this judgment the respondent reclaimed, and the Court thereupon remitted to the Lord Ordinary to allow a re-examination of Cairns, and a proof of the condescendence by other witnesses. This having been done, his Lordship reported the case to the Court; and their Lordships, on the 26th of May 1819, 'having considered the whole cause, and having regard to the 'whole circumstances of the case, in terms of the remit from the 'House of Lords, and especially to the several circumstances 'specified in the said remit,' repelled the reasons of reduction, and assoilzied the defender.*. June 20. 1823.

White then appealed against this judgment, on the ground, —1. That although it had been found by the former judgment of the House of Lords, that John Dalgleish was of sufficient understanding and capacity to enable him to execute a settlement of his property, yet this was under the qualification that it should be established that he was duly and fully informed of the nature and effect thereof;—that it was therefore incumbent on the respondent to show that he had been so informed;—and that although a deed which was ex facie unobjectionable proved itself, yet so soon as it was shown that the granter was not of ordinary capacity and understanding, the presumption was, that he did not understand the nature of it without its being explained to him, and consequently the onus lay upon the respondent of showing that such information and explanation was given to John Dalgleish;—that the only witness who had been adduced to show that this had been done was Cairns, who stood in a suspicious situation,—contradicted himself in several respects,—and assigned unsatisfactory and inconsistent reasons for deviating from the written instructions, and therefore the essential circumstance required by the judgment of the House of Lords to give validity to the deed had not been established. —2. That it was undoubted, that from the month of February, when the deed was executed, till September 1808, when the alleged back letter was granted, the settlement did not express that which was the will and intention of John Dalgleish;—that that letter could not be regarded as part of the settlement, and, even according to the respondent's own statements, had been written under circumstances of great suspicion, being dated at Dryhope, whereas it was admitted that it was written in Cairns' office at a great distance;—and, 3. That as the deed did not express the will of John Dalgleish, and no other settlement had been made, he had died quoad hoc intestate, and therefore the lands belonged to the appellant as his heir-at-law.

* Not reported.

June 20. 1823.

To this it was answered,—

1. That as it was established that John Dalgleish was capable of making a valid deed, the one in question must be regarded as unobjectionable, and therefore it was incumbent on the appellant to make out his case by sufficient evidence: And,—

2. That, at all events, it had been proved by the deposition of Cairns, that the reason for introducing the name of the respondent into the deed, in place of that of David Ballantyne, had been fully explained to John Dalgleish; and that as the respondent had granted the back letter binding himself to convey the lands to David Ballantyne, the intention of the granter had been carried into full effect.

The House of Lords 'ordered and adjudged, that the said interlocutor complained of in the said appeal, so far as it repels 'all the reasons of reduction alleged by the appellant, and assoilzies the respondent from all the conclusions of the appellant's libel, and finds the appellant liable in the expenses of 'process, and all the directions consequent thereupon, be, and the 'same is hereby reversed; and it is declared, that the disposition 'contained in the instrument under reduction, so far as it imports to dispose of any interest in the lands therein mentioned 'for the benefit of the respondent, his heirs and assignees, was 'contrary to the intention of the said John Dalgleish, as expressed 'in the jottings made by James Cairns, when he took instructions 'from the said John Dalgleish for preparing such instrument; and 'that the instrument, purporting to be a letter from the respondent, dated Dryhope, 17th September 1808, and signed Robert 'Ballantyne, cannot, under the circumstances, be deemed an instrument affecting the disposition of the said lands contained in the 'instrument under reduction; and that, therefore, such instrument 'under reduction, so far as the same imports a disposition for the 'benefit of the respondent, his heirs and assignees, ought to be reduced, without prejudice to any question with respect to the 'several charges imposed on such lands by the said instrument, in 'case the other property of the said John Dalgleish shall prove 'not to be sufficient to satisfy such charges; and therefore it is 'ordered and adjudged, that such instrument so under reduction 'be, and the same is hereby reduced, so far as the same imports 'any disposition of a beneficial interest in the said lands to the respondent; without prejudice, nevertheless, to any question which 'may be raised with respect to the several charges imposed on such 'lands by the said instrument so under reduction, in case the other 'property of the said John Dalgleish, disposed of by such instrument, shall prove not to be sufficient to satisfy such charges; but

'that such beneficial interest (subject to such claim as aforesaid) 'ought to be considered as not disposed of by the said instrument, 'and as having therefore descended to the appellant, as heir of the 'said John Dalgleish, subject to any charges which may affect 'the said lands, independent of the disposition contained in the 'said instrument: And it is further ordered and adjudged, that 'the said cause be remitted back to the Court of Session in Scot-'land, to do therein as shall be consistent with this judgment, 'and as shall be just.'

June 30. 1823.

J. CHALMER,—A. MUNDELL,—Solicitors.

(*Ap. Ca. No.* 19.)

WALTER LEARMONTH and COMPANY, Appellants.—*Copley—Pemberton.*

JOHN LIVINGSTONE and his Factor loco Tutoris, Respondents.—*Bell—M'Neill.*

No. 64.

Partnership.—Circumstances under which it was held, (affirming the judgment of the Court of Session,) That there was no evidence of the respondent being a partner of a company indebted to the appellants.

THIS was a question of fact depending on the import of voluminous written evidence. The appellants, Walter Learmonth and Company, brought an action against the late Alexander Livingstone, Esq. of Parkhall, (who was now represented by his son, the respondent,) concluding for payment of upwards of £12,000, being a debt due to them by the company of Learmonth and Sons, of which company they alleged that Alexander Scott Learmonth and Company formed a constituent part, and that Alexander Livingstone had been a partner of that latter company. In defence, Mr. Livingstone admitted that he was a partner of Alexander Scott Learmonth and Company, but denied that it formed a part of that of Learmonth and Company, or that he was a partner of the latter firm, and therefore contended that he could not be liable for its debts. The Lord Ordinary, on advising the evidence, assoilzied Mr. Livingstone; and Learmonth and Company having reclaimed, the Court remitted to Mr. Galloway, accountant, to examine into the facts, and report. He reported, 'That there is complete evidence of the concern of 'Alexander Scott Learmonth and Company being separate and 'distinct from Learmonth and Sons; that the accounts of profit 'and loss have been erroneously kept by Learmonth and Sons, 'but that the transactions of the one company can be separated

July 2. 1823.

2D DIVISION. Lord Robertson.

July 2. 1823. 'from those of the other in said accounts, and that it does not 'appear from the productions in process that Alexander Scott 'Learmonth ever held himself out, or conducted himself as a 'partner of Learmonth and Sons, or drew or bore any share of 'the profit and loss of that concern.' The Court, on the 17th November 1819, thereupon adhered;* and Learmonth and Company having appealed, the House of Lords 'ordered and ad-'judged, that the interlocutors complained of be affirmed, with '£350 costs.'

GATTIE, HADDEN, and GATTIE,—J. RICHARDSON,—Solicitors.

(*Ap. Ca. No.* 21.)

No. 65.

ARCH. STIRLING, Esq. Appellant.—*Fullerton—Shaw Stewart.*
CLAUD ALEXANDER, Esq. Respondent.—*Gifford—Forsyth.*

Freehold Qualification—Member of Parliament.—Circumstances under which it was held, (affirming the judgment of the Court of Session,) That a party was not entitled to be enrolled as a freeholder.

July 2. 1823. 1ST DIVISION.

THE Earls of Glencairn were originally the proprietors of the barony of Duchal in Renfrewshire, which they feued out to the families of Porterfield, Maxwell, Cunningham, and others. The family of Porterfield, having acquired the part including the mansion-house, assumed the title of Porterfield of Duchal; while that of Maxwell, having got the part which was denominated the Overmains, took the title of Maxwell of Overmains, including several smaller pendicles. The property of Overmains was subsequently sold by the Maxwells to the family of Porterfield, and was incorporated with that of Duchal.

The Earls of Glencairn created out of these lands a number of freeholds, and among others there was exposed to sale, as affording a superiority, certain lands described in the Crown charters of the barony of Duchal as 'terras de Overmains *de* Corruith.' This was purchased by the late Mr. Handyside, writer to the signet, in virtue of which, and certain other lands, he claimed to be enrolled as a freeholder, and produced evidence to show that the lands of Overmains stood valued in the cess-books at £383: 6: 8 Scots. He was accordingly enrolled, and his claim was afterwards sustained by the Court of Session. On the death of Mr. Handyside, his son and heir was served in special to these subjects, the retour

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* Not reported.

bearing that his father had died infeft 'in terris de Overmains *et* 'Corruith.' Having been infeft, he sold them to Sir John Maxwell, who thereupon executed the procuratory of resignation, and obtained from the Barons a charter conveying to him 'totas et integras 'terras de Overmains *et* Corruith, cum tenen. tenan. libereque tenen. 'servitiis omnibusque pertinentiis earundem, jacen. infra dictam 'baroniam de Duchal, et vicecomitatum prædict.; quæ terræ de 'Overmains *et* Corruith comprehendunt, inter alias, quadraginta 'solidat. terras vocat. *Overmains de Duchal*, viginti duas solidat. 'terras de Wreaths vel Wraes, et tredecim solidat. et quatuor de-'nariat. terrarum de Creuchhill, omnes jacentes infra dictam baro-'niam de Duchal, ac terras de Corruith, pertinen. in proprietate ad 'Cunningham de Cairncurran.' Sir John then granted a disposition and assignation to the appellant Mr. Stirling, by which he conveyed to him 'the said forty shilling land called the Overmains of Duchal, 'with tenants, tenantries, and services of free tenants of the same, 'lying within the barony of Duchal and sheriffdom of Renfrew fore-'said;' and Mr. Stirling was infeft in virtue of the unexecuted precept contained in the Crown charter. He then claimed to be enrolled as superior of the forty shilling land of Overmains of Duchal; and, to prove the valuation, he produced a retour, dated 26th September 1678, of Sir George Maxwell as heir to his father in various lands, and, among others, 'in totis et integris qua-'draginta solidatis terrarum vulgo vocat. the Overmains of Duchal, 'cum suis pertinen.' Having been accordingly enrolled, the respondent Mr. Alexander, one of the freeholders of the county, presented a petition and complaint, in which he contended that the titles produced by Mr. Stirling were not sufficient to entitle him to be admitted to the roll. In support of this he gave the above history of the lands, and stated that the subjects which had been conveyed to Sir John Maxwell were not 'Overmains et Cor-'ruith,' but 'Overmains *de* Corruith:'—that, with the view of making up freehold qualifications, the heir of Mr. Handyside had been served to the lands of 'Overmains *et* Corruith,' which thus appeared to be two subjects, but was truly only one; and that a comprehending or descriptive clause had been introduced into the Crown charter, bearing that these lands of 'Overmains et Cor-'ruith' comprehended Overmains of Duchal, but that it was impossible to point out any lands corresponding with that description. He therefore maintained,— July 2. 1823.

1. That the Crown charter founded on did not *dispone* the Overmains of Duchal, but only the lands of Overmains and Corruith:—that the former were merely said to be *comprehended* within the latter; but that it was well known that in practice the

July 2. 1823. Barons of Exchequer allowed a party to introduce into his charter any lands he thought fit, as comprehended within those disponed, and that this was done merely for the sake of description, and was inserted periculo petentis:—that, further, it was proved by the previous titles that the lands disponed were not the two separate subjects of Overmains and Corruith, but one subject only—the Overmains of Corruith; and as these titles had been deviated from in the charter, it was impossible to ascertain whether de facto the Overmains of Duchal were embraced within the Overmains of Corruith or not: And,—

2. That Mr. Stirling could not point out any portion of ground within the county of Renfrew as the Overmains of Duchal, on which he could have a right of freehold.

To this it was answered,—

1. That the history of the lands given by Mr. Alexander was erroneous, and that it was proved by the titles that there was a separate and independent subject denominated the Overmains of Duchal.

2. That as the respondent had produced a Crown charter, conveying Overmains and Corruith, including the Overmains of Duchal, these latter lands were of necessity disponed as part of that in which they were embraced; and as he had shown, by a retour dated prior to 16th September 1681, that the lands were a forty shilling land, he had produced all the evidence which was necessary in order to be enrolled; and that it was not competent in hoc statu to revert to the former titles, in order to contradict those on which he founded: And,—

3. That although it was now difficult, from the division and subdivision which had been made by the vassals, to point out the precise bounds of the lands in question, yet there could be no doubt that such lands did exist within the county of Renfrew, and the right of the superior could not be affected by the acts of the vassals, in rendering it difficult to point out the boundaries.

The Court at first 'found the complaint irrelevant,' and dismissed it; but thereafter, on the 26th of November 1818, altered, and found 'that the freeholders of the county of Renfrew, at 'their Michaelmas meeting of 1817, did wrong in enrolling the 'respondent Archibald Stirling in the roll of freeholders of said 'shire,' and granted warrant to expunge his name accordingly; and to this interlocutor they adhered on the 18th of February 1819.*

* Not reported.—In the Respondent's Case it is stated, in reference to the objection that Mr. Stirling was unable to point out the lands and show his possession, that the Judges of the Court of Session were ultimately convinced that this objection per se was fatal to the appellant's claim.

Against these judgments Mr. Stirling appealed; but the House of Lords ordered and adjudged that the interlocutors complained of be affirmed. July 2. 1823.

Appellant's Authorities.—(2.)—Burns, Feb. 17. 1779, (8852); Adam, July 4. 1809, (F. C.)

J. RICHARDSON,—SPOTTISWOODE and ROBERTSON,—Solicitors.

(*Ap. Ca. No.* 22.)

EARL of SEAFIELD and CURATOR, Appellants.—*Gifford—Corbet—Mackenzie.* No. 66.

Sir GEORGE ABERCROMBY, Respondent.—*Connell—Hope.*

Teinds—Allocation—Relief—Stat. 1690, c. 23.—The patron of a parish having acquired a tack of all the teinds of the parish, which was subsequently prorogated; and having assigned part of the teinds so held by him to a third party, who was to bear the burden of future augmentations, &c. according to an equal proportion with the rest of the teinds of the parish; and thereafter the patron having acquired right by the statute 1690, c. 23, to the teinds of the parish not heritably disponed, and an augmentation having been subsequently granted to the minister—Held, (remitting with special findings to the Court of Session,) That, in a question with the patron and cedent, the assignee was only liable to be allocated in proportion to the other teinds of the parish, and that the patron could not insist on the teinds so assigned by him being entirely allocated primo loco.

IN 1604 Patrick Darg, parson of the united parishes of Fordyce and Cullen in the county of Aberdeen, with consent of the bishop of the diocese of the synod of Aberdeen, and of Sir Walter Ogilvie of Findlater, the patron of the parishes, let the whole teinds thereof to James Ogilvie, eldest son of Sir Walter, for 38 years, at a certain rent. The tack stated, that he had done so 'for ane certain soume 'of money in name of grassum, payd to me be James Ogilvie, 'eldest lawfull son of the said Sir Walter, and be utheris in his 'name, quhairof I hold me weill contented, satisfeit, and plea-'santlie payit; and thairfor, for me, my airis, executors, assig-'nais, and successors, exoneris, quyt claims, and discharges the 'said James, his airis, executors, and assignais thereof, for now 'and ever renunceand the exception of not numerat money, and 'all utheris quilk may be proponed in the contrar; as also, for 'the .... utilitie and weill of the kirk and suocessoris thairof, 'ministers at Fordyce and Cullen, speciallie for the augmentation 'of the sum of five hundreth merkis, usual money of this realm, July 16. 1823.

TEIND COURT. Lords Reston and Cringletie.

July 16. 1823. 'to be paid yearly to the saidis ministeris, in manner following, 'mair nor wes containat in the assedation set of auld.' The reddendo of the tack was in these terms: 'Payand therefor yearly the 'said James Ogilvie, his heirs-male and assignees foresaid, to 'me and my successors, our factors and chamberlaines, or uthers 'haveand our power, all and haill the sum of three hundreth 'merkis, usual money of Scotland, as the auld dutie and teind-'silver payit of before for the teind-sheaves and viccarage of the 'said parochin of Fordyce, with the pendicles foresaid, together 'with the sum of five hundreth merkis, money foresaid, in aug-'mentation of the rental of the said teind-sheaves and teind viccar-'age, mair nor wes contained in the assedation set of auld, ex-'tending in the hail to the sum of aucht hundreth merkis, to be 'payed in manner and at the termes following.'

Patrick Darg having thereafter, in 1618, obtained an augmentation of stipend, the tack which he had granted to James (now Sir James) Ogilvie was prorogated from the expiry of the original term for 203 years—that is, till 1845. In 1656, Sir James Ogilvie (who was now Earl of Findlater) executed an assignation of the tack and decreet of prorogation, so far as they included the teinds of Birkenbog, situated within the united parishes, in favour of John Abercromby of Farskan, during the whole period of the tack so prorogated. The terms of the assignation were thus expressed:—'And now for certain sums of money, causes 'onerous, others gratitudes and good deeds payed, done, and per-'formed to me be Mr. John Abercromby of Farskan, my cousin, 'whereof I hold me well pleased, and exoners and discharges him 'of the samen for ever: Wit ye me, as having the only undoubted 'right of the parsonage teinds of the lands under written, by virtue 'of the rights and titles above mentioned, to have made, consti-'tuted and ordained, and be the tenor hereof make, constitute, 'and ordain the said Mr. John Abercromby, his heirs and dona-'tors whatsoever, my very lawful, undoubted, and irrevocable 'cessioners and assignees, in the maist ample form of assignation 'and disposition, in and to the fore-named tack of the teind-sheaves 'of the lands under written, and decreet of prorogation above 'mentioned and following thereupon, in so far as the samen may 'be extended, and doth concern the teind-sheaves and right of the 'teinds of the lands of the barony of Galdcross, comprehending 'the towns and lands of the mains of Birkenbog &c., as the 'samen is occupied and possessed by the tenants and possessors 'thereof, lying within the park of Galdcross, parochin of For-'dyce, and sheriffdom of Banff, and that for all the days, years, 'and space contained in the foresaid tack and decreet of proro-

'gation above mentioned.' There was then subjoined a conveyance of the power of collecting the teinds of the lands above named, of using inhibition, and maintaining actions of spulzie, and of granting tacks of 'the samen teynd-sheaves of the 'said lands, or any part thereof, long or short, to set and dispone 'to whatsomever person or persons he shall think expedient, and 'generally all and sundry other things to do, use, and exerce 'anent the premises, sicklike and as freely in all respects, as I 'might have done myself before the making hereof, paying for 'the said teynd-sheaves of the lands above specified, the said Mr. 'John Abercromby and his foresaids, to me, my heirs and successors, or to the minister of Fordyce for the time, for my relief, 'the present teind-silver payable by Mr. Alexander Abercromby 'of Birkenbog, heritor of the said lands, and the tenants and 'possessors thereof, extending to the sum of yearly, 'as the proportional part of the minister of Fordyce his present 'modified stipend, and that all for either tack-duty, due service, 'or further burden, may be imposed or asked furth of the said 'teind-sheaves: And sicklike the said Mr. John Abercromby and 'his foresaids relieved me and my foresaids of all stents, taxations, impositions, and annuities quilk shall happen to be imposed 'or already imposed upon the said teinds in time coming during 'this present right, and that according to an equal proportion 'with the rest of the teinds of the said parochin of Fordyce: 'Likeas I, by thir presents, declare this present assignation and 'disposition of the teind-sheaves of the lands above specified to 'be as valid and sufficient a title and right, in whatsomever respect, as if the same had been made and granted by way of 'tack and assedation during the haill years and space contained 'in the rights and the titles made and granted to me thereupon; 'and shall warrant and defend this present right and assignation 'to the said Mr. John Abercromby and his foresaids from my 'own fact and deeds allenarlie, to wit—that I have not done, nor 'shall not do any thing which may be hurtfull or prejudicial 'hereunto in any sort; and further, I bind and oblige me and 'my foresaids to make the foresaid tack and decreet of prorogation above mentioned furthcoming to the said Mr. John Abercromby and his foresaids, whenever he shall have adoe therewith, 'either for pursuit or defence of any action competent thereby, 'or at least shall produce and exhibit before any Ordinar Judge, 'to the effect the samen may be transumed, and the transumpts 'thereof delivered to the said Mr. John Abercromby and his 'foresaids upon their own proper charges and expences.'

July 16. 1823.

Thereafter, in 1665, John Abercromby, the assignee, con-

July 16. 1823. veyed the teinds which had been so assigned to him to Sir Alexander Abercromby, proprietor of the lands of Birkenbog, in liferent, and to his son Alexander in fee. To these lands of Birkenbog, and also to the teinds which had been so assigned, the respondent, Sir George Abercromby, subsequently acquired right.

By virtue of the statute 1690, c. 23, the Earl of Findlater, as patron, obtained an heritable right to those teinds of the parish which were not heritably disponed, 'with the burden always of 'the minister's stipend, tacks and prorogations already granted of 'the said teinds, and of such augmentations of stipends, future 'prorogations, and erections of new kirks, as shall be found just 'and expedient.'

Thereafter the Earl of Seafield succeeded to the estates of the Earl of Findlater, and to the original tack and decreet of prorogation; and being patron of the parish, and the clergyman having obtained two augmentations in 1796 and 1812, a question arose as to the mode in which this new burden should be imposed on the teinds held by the respective parties. On the part of the Earl of Seafield it was maintained, that as he had an heritable right to his teinds in virtue of the statute 1690, c. 23, and as Sir George Abercromby held his only as tacksman, both the tack-duty and the teinds so held by him must be allocated before those which the Earl heritably possessed. On the other hand, Sir George Abercromby contended, that such a right under the statute 1690, acquired subsequent to the assignation of the tack in 1656, was under the burden of that tack, and could not have the effect to discharge the clause of warrandice; and the stipulation that the supervenient burdens were to be borne by the assignees under the tack, 'according to an equal proportion with the 'rest of the teinds of the said parochin.' Lord Reston, on the 28th November 1815, in respect 'that Sir George Abercromby 'possesses his teinds under an assignation to a tack in 1656, 'which makes the assignee liable in augmentation in proportion 'to the other teinds of the parish, and that the Earl has right to 'the teinds of his lands under the act 1690, c. 23, which re-'serves tacks previously granted, found that, during the subsist-'ence of the tack, the Earl and Sir George fall to be allocated 'on inter se pari passu.' The Earl of Seafield having represented against this interlocutor, Lord Cringletie, on 25th February 1817, found, 'That the order of allocating stipends, as laid 'down by all authorities, is, that the free teinds in the hands of 'the titular, and, of course, the teinds of such heritors as have no 'right to them, being in that situation, are first liable. 2d, That

'where there are tacks of teinds, the tack-duty payable to the titular or patron is next liable. 3d, That the teinds themselves under that lease, as being held by a temporary right only, are liable tertio loco; and, last of all, the teinds of heritors, including those of the titular or patron, who have heritable permanent rights to their tithes; therefore alters the interlocutor complained of, so far as to find, that the teinds of Sir George Abercromby's lands, to which he has right only by a lease, which lasts no longer than the year 1845, are liable to be exhausted before any part of the teinds of the lands pertaining to the Earl of Seafield, the patron, can be localled upon; but in respect that the said Earl obtained right to his teinds in virtue only of the act 1690, c. 23, though they appear now to have been inserted in a charter from the Crown in 1750, with an infeftment thereon, and by the said statute his Lordship is expressly burdened with then existing tacks, or prorogations of tacks; as also, that by the assignation to Sir George Abercromby's author in 1656, the assignee is declared to be liable for augmentation only in proportion to the other teinds of the parish; finds, that Sir George Abercromby is entitled to relief from the said Earl of such part of the minister's stipend as he shall pay yearly, over and above what has been paid by him in time past, under the former locality, during the currency of the said tack, in terms of the case of Edzell, 9th December 1713.' July 16. 1823.

'NOTE.—The Lord Ordinary considers that the principle assumed in his interlocutor arises out of the temporary nature of a tack. A locality is permanent, and consequently must be made on principles which will apply to it during its existence. But in 1845, after the lease expires, the principle that Sir George Abercromby's land must be allocated on along with the Earl of Seafield's will cease; and therefore his teinds must now be localled upon, affording him relief in the manner set down in the foregoing interlocutor. In this way, Sir George gets the same relief afforded him by Lord Reston's interlocutor during the currency of the lease, which is all he is entitled to; and afterwards the locality remains on its true principles; because, after 1845, Sir George's teinds will be free teinds. Were it possible for the Earl of Seafield to refuse to give this deduction, it appears to the Lord Ordinary that Sir George would, in that case, be entitled to a prorogation of his tack, provided his teinds be not exhausted, as the statutes authorize this Court to take the teinds under lease for stipend to the minister; but if this be done, these statutes also infer that a prorogation of the lease should be given.'

July 16. 1823. Against this interlocutor the Earl of Seafield again represented; and in appointing the representation to be answered, Lord Cringletie issued this note:—

'The Lord Ordinary wishes the respondent to attend to this 'circumstance: In 1656, when the Earl of Findlater assigned the 'tack of teinds to John Abercromby, in so far as regarded the 'lands of Birkenbog, the Earl was tacksman only of the whole 'teinds of the parish; and, of course, he stipulated that the 'teinds of Birkenbog should bear an equal part of the burden of 'future augmentations proportionally along with the other teinds 'of the parish. This stipulation is only what would have been 'enforced by law, if none such had been expressed; because the 'whole other teinds having been in pari casu with those of Birken-'bog, all held by tack, all would have been equally liable to aug-'mented stipend. But the difficulty is, did that stipulation, 'which inerat de jure imply a warrandice, that if the Earl 'ever acquired an heritable right to these teinds, he was not to 'claim the benefit arising by law out of such right? For, unless 'this warrandice shall be implied, it seems difficult to say, that, 'having acquired an heritable right, his Lordship is not to have 'the advantage of it. Suppose the Earl had sold the patronage 'to another prior to the act 1690, would that other have been 'bound to relieve Sir George Abercromby? He would have got, 'as the Earl did, the teinds under the burden of the tack; but 'does the tack infer that the teinds were not to be burdened to a 'greater extent than the tack-duty, unless a similar burden was 'imposed on the teinds held by heritable rights, either in the per-'son of the patron, in virtue of the act 1690, or by purchases from 'him, under the authority of the act?' Upon advising the representation with answers, his Lordship pronounced this interlocutor: 'The Lord Ordinary having again advised this repre-'sentation with answers, in respect that the predecessor of the 'representer acquired, qua patron of the parish of Fordyce, the 'titularity of the teinds thereof, in virtue of acts of Parliament, 'is of opinion that he incurred no liability from the warrandice 'given from fact and deed in the assignation to the respondent's 'predecessor, granted by James Earl of Findlater, of the tack of 'teinds in his Lordship's favour, in so far as the same related to 'the teinds of the lands of Birkenbog, belonging to the respond-'ent's predecessor; and therefore recalls the interlocutor com-'plained of, in so far as it finds that the representer must relieve 'the respondent of the proportion of stipend allocated on his 'lands during the currency of the said tack; but, quoad ultra, 'adheres to that interlocutor.'

Sir George Abercromby then reclaimed to the Court; and on the 9th December 1818 their Lordships 'altered the interlocutors of Lord Cringletie complained of, and affirmed that of 'Lord Reston, of date the 28th November 1815, finding that, 'during the subsistence of the tack to which Sir George Abercromby, the petitioner, has right by assignation, the petitioner 'and the respondent fall to be allocated upon inter se, pari passu.' The Earl of Seafield having brought this judgment under review, their Lordships, on the 16th of June 1819, 'recalled the interlocutor complained of, and found in terms of Lord Cringletie's 'interlocutor in the cause, of date the 25th day of February '1817, in all respects, and decerned accordingly.'* July 16. 1823.

The Earl of Seafield then appealed against the judgments thus finding him liable in relief to Sir George Abercromby, on the ground,—

1. That it is a rule of the law of Scotland, that teinds to which the heritors of the lands from which the teinds arise have either no right at all, or a right by tack only, are liable to allocation before those held by heritable right: that it made no difference on this rule that the teinds heritably possessed had been acquired by virtue of the statute 1690, and not by ordinary titles, because the right bestowed by that statute proceeded on an onerous consideration, viz. the loss of the patronage; and that although there was a provision that this right should be under the burden of tacks, yet this was not intended to alter the ordinary rules of allocation, but merely to declare that the tacks should stand good against the new titular.

2. That there was nothing in the assignation of the lease to entitle Sir George Abercromby to relief, seeing that such an assignation of part of the teinds could not prevent the Earl of Findlater (by whom it was granted, and who had right to the other teinds as tacksman) from acquiring a higher right to these teinds, and so obtaining a privilege in a question of allocation: And,—

3. That, at the very utmost, the Earl of Seafield was not liable in a total relief, but only for such part as Sir George Abercromby was bound to pay of the augmented stipend over and above his tack-duty, in proportion with that falling on the other teinds of the parish.

On the other hand, it was maintained by Sir George,—

1. That, prior to 1690, the predecessors of the respective parties stood in the situation of joint tacksmen of the whole teinds of the parish—those of Sir George having right to the teinds of Birkenbog, while those of the Earl of Seafield possessed the remaining

* Not reported.

July 16. 1823. teinds of the parish:—that by the assignation it was expressly stipulated that the predecessor of the Earl should not do 'any 'thing which may be hurtful and prejudicial hereunto in any sort; 'and that the assignee should only suffer the burden of future 'impositions upon the teinds, according to an equal proportion 'with the rest of the teinds of the said parochin of Fordyce:' that, therefore, if, prior to the statute 1690, a stipend had been modified and localled, the allocation must have been made rateably upon the joint tacksmen, and consequently neither the Earl of Findlater nor his representatives could, consistently with that assignation, acquire any right by which the assignee would be placed in a worse situation than he formerly was under his assignation, which limited his obligation to the payment of the rent therein stipulated: And,—

2. That the statute expressly burdened the heritable right thereby bestowed with all the tacks then in existence, and consequently with all the stipulations and clauses in these tacks; so that (independently of the circumstance of the Earl of Seafield's representing the granter of the assignation) he could only avail himself of the heritable right bestowed by the statute, subject to the burden there mentioned.

The House of Lords found, 'That the teinds of the whole 'parish of Fordyce appear to have been comprised in the tack 'dated 9th August 1604, subject to the tack-duty, in the name 'of teind-silver, reserved by the said tack; and that such tack 'was, by the decreet of the Commissioners of Parliament of the '19th June 1618, prorogated in favour of James, then Earl of 'Findlater, (then claiming the benefit of the said tack of 1604,) 'for the space of 203 years after the expiring of the said tack, 'which prorogation will not expire till the year 1845; and that, 'at the date of the assignation of the 14th June 1656, the said 'James Earl of Findlater was entitled, under the said decreet of 'prorogation, to all the teinds of the said parish for and during 'all the time expressed in the said decreet of prorogation, and 'that no title could be gained to the teinds of any part of the said 'parish, but subject to the said prorogation of the said tack, un-'less with the concurrence of the said James Earl of Findlater, 'or of those claiming under him: And the Lords further find, 'that, according to the terms of the said assignation of the 19th of 'June 1656, the respondent Sir George Abercromby, claiming 'under the said assignation, was, as between him and the appel-'lant claiming under the said James Earl of Findlater, liable to 'be charged for further augmentation of the minister's stipend 'in respect of the teinds comprised in the said assignation of 1656, 'over and above what had been before paid by him under the

'terms of the said assignation, in proportion to the other teinds of the said parish, but not in any greater proportion; and that the appellant, claiming under the said James Earl of Findlater, who was entitled under the said tack and prorogation, and was also patron of the said parish, is bound, under the terms of the said assignation of 1656, to relieve the respondent of such part of the minister's stipend as he shall pay yearly during the continuance of the said tack, over and above an equal portion with the rest of the teinds of the said parish comprised in the said tack and prorogation of tack, the said tack and prorogation of tack being, as between the appellant and respondent, to be deemed to have continued until the expiration of the said term of 208 years with respect to all the teinds of the said parish, in regard that during the said term no title to the said teinds could have been obtained by any person, except subject to the said tack and prorogation of tack, without the act and concurrence of the said James Earl of Findlater, or of those claiming under him; and therefore, if any title to any of such teinds has been obtained, discharged from the said tack and prorogation of tack, the same must have been obtained by the act of the said James Earl of Findlater, or of those claiming under him: And it is ordered, that with these findings the cause be remitted back to the Court of Session, to do therein as shall be consistent with these findings, and as shall be just.' July 16. 1823.

Appellants' Authorities.—2. Ersk. 10. 51. and 52; 2. Connell, 233. 238, and Cases there quoted; 3. Stair, 2. 2.

Respondent's Authorities.—Arbuthnot, Dec. 2. 1698, (7751); Forbes, Dec. 9. 1713; Dunbar, Jan. 17. 1750, (15863); 2. Connell, 238.

J. CHALMER,—J. RICHARDSON,—Solicitors.

(*Ap. Ca. No. 24.*)

THOMAS DUNLOP DOUGLAS, Esq. Appellant.—*Skene.*
SIR JAMES COLQUHOUN, Respondent.—*Forsyth.*

No. 67.

Freehold Qualification—Member of Parliament—Retour.—Held, (affirming the judgment of the Court of Session,) That a retour of feu-lands bearing the old extent to be £4: 3: 4, and the new extent and feu-duties to be £4. 5s., was not sufficient to establish that the lands were a forty shilling land of old extent.

THE appellant Thomas Dunlop Douglas, having claimed to be enrolled in the roll of freeholders of the county of Dumbarton, produced in support of his claim,—1. A charter of resignation July 16. 1823.
2D DIVISION.

July 16. 1823. under the Great Seal in his favour, dated the 9th February 1819, granting to him 'totas et integras terras de Ardochbed, cum 'domibus, ædificiis, et pertinentibus earundem infra parochiam 'de Cardross et vicecomitatum de Dumbarton, jacens uti eadem 'per Gulielmum Cunningham Bontine, Armigerum, tunc de Ardoch; 'nunc Gulielmum Cunningham Bontine Cunningham Grahame 'de Gartmore, ejusque tenentes, possessæ erant, vel nunc possi- 'dentur; sed semper cum et sub onere et exceptione jurium feodi- 'firmariorum, et jurium proprietatis in persona dicti Gulielmi 'Cunningham Bontine Cunningham Grahame existen., quæ per- 'prius per illum ejusque predecessores et auctores de et sub Do- 'mino Jacobo Colquhoun de Luss, Baronetto, ejusque hæredibus 'in statu talliato de Luss tenebantur pro solutione feudifirmari- 'orum, devoriarum aliarumque devoriarum, et casualitatum in 'antiquis juribus et infeofamentis content.'

The reddendo in this Crown charter was in the following terms:—'Reddendo inde annuatim dictis Thomæ Dunlop Dou- 'glas ejusque prædict., nobis nostrisque regiis successoribus im- 'mediatis, legitimis superioribus earundem, summam quatuor li- 'brarum quinque solidorum monete Scotiæ apud terminos Pente- 'costes et Sancti Martini in hieme, per equales portiones, nomine 'feudifirmæ, si petatur tantum, idque pro omni alio onere, exac- 'tione, demanda, seu servitio seculari.'

2. An instrument of sasine thereon;—and, 3. A retour of the service of one of the former proprietors of the estate, dated the 19th of October 1496, in order to prove that the lands were a forty shilling land. In relation to the valuation of the lands, the retour was thus expressed:—'Et quod dicte terre, cum pertinen., valent 'nunc per annum quatuor libras et quinq. solidos monete hujus 'regni, et valuerunt tempore pacis quatuor libras tres solidos et 'quatuor denarios ejusd. monete; et quod tenentur de dicto 'S. D. N. Rege et suis successoribus in feudifirma et hæreditate 'pro annua solutione prefat. S. D. N. et suis suprascriptis dicte 'summe quatuor librarum et quinq. solidorum ad duos anni ter- 'minos, festa, viz. Penthecostes et Stī Martini in hieme, per 'equales portiones, ac duplicatione dicte feudifirme primo anno 'introitûs cujuslibet hæredis in et ad dictas terras, cum pertinen.'

The freeholders having sustained the claim, Sir James Colquhoun presented a petition and complaint, praying to have Mr. Douglas's name expunged from the roll. In support of this complaint he objected,—1. That it was requisite by the statute 1681 that a claimant in virtue of the old extent should be 'in posses- 'sion of a forty shilling land of old extent, holden of the King 'or Prince, distinct from the feu-duties and feu-lands:' that by

this was meant, not merely that the valuation should be retoured separate from the feu-duties, but that it should amount to forty shillings, independent of and under deduction of these feu-duties: that it had been a common practice for juries to retour the valuation at the amount of the feu-duties, and it had been decided that where a party founded on a retour of feu-lands, where the valuation and the feu-duties were either the same, or nearly the same, it was to be held that the jury had just adopted the feu-duties as the valuation, and therefore that there was no evidence of the lands being a forty shilling land of old extent, and that the retour in question was precisely in that situation, because the lands held feu; and while it was stated that the old extent was £4: 3: 4 Scots, it appeared that the feu-duty was £4. 5s. Scots, being only a difference of a halfpenny sterling.—2. That it appeared from the former charters and other titles of the lands that the feu-duty had been originally £4 Scots, and had been gradually increased by augmentations, first to £4: 3: 4 Scots, and then to £4. 5s.: that, in making the present retour, the jury had evidently adopted the immediately preceding feu-duty as the old extent, viz. £4: 3: 4, and the then feu-duty, (which had been augmented to £4. 5s.,) both as the new extent and the feu-duty actually payable;—and, 3. That although it appeared from the reddendo clause that the sum there mentioned was to be paid 'nomine feudifirmæ, si petatur tantum,' yet this could not establish, contrary to the whole tenor of the titles, that the lands were held blench: that the introduction of these words was explained by the circumstance, that a former proprietor held the heritable office of Coroner of Dumbartonshire blench for payment of a penny Scots, si petatur tantum; and that this had been introduced into the former titles, and these words retained per incuriam, after the proprietor had ceased to hold that office. On the other hand, it was contended by Mr. Douglas,—1. That as the statute 1681, c. 21, merely required that the vassal should be in possession of a forty shilling land of old extent, 'distinct from the feu-duties 'or the feu-lands,' it was quite sufficient that a retour was produced, prior to the 16th of September 1681, bearing that the lands were a forty shilling land of old extent, and that this was stated separately and distinct from the feu-duties: that it was proved by the retour in question that the old extent was £4: 3: 4, whereas the feu-duties were retoured not only separately and distinctly from that valuation, but at a different sum, being £4. 5s: that although it had been decided that where the jury returned no distinct and separate answer, setting forth what the old extent was, and merely mentioned the amount of the feu-duties or new

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July 16. 1823. extent, adding in general terms, 'et valuerunt tantum tempore 'pacis,' it was to be presumed that the jury merely adopted the feu-duties as the old extent, but that no such presumption could exist where a separate answer had been made as to both points, and that the circumstance of there being a small difference between them showed that the jury could not at random have adopted the feu-duties as the old extent.—2. That in terms of the statute 16. Geo. II. c. 11, it was not competent to resort to any other evidence on the subject than that of a retour; and therefore, as the documents produced by Sir James Colquhoun were not of that nature, the Court could not look to them, but must be guided entirely by the retour founded on;—and, 3. That the terms of the reddendo clause established that the lands could not be regarded as feu-lands, and therefore that the provision of the statute 1681, c. 21, could not apply. The Court, on the 2d of June 1821, by a majority 'sustained the complaint; found that the 'freeholders did wrong in enrolling the respondent in the roll 'of freeholders in the county of Dumbarton, and therefore 'granted warrant to, and ordained the Sheriff-clerk of the said 'county to expunge the respondent's name from the roll;' but found no expenses due.

Mr. Douglas having reclaimed, the Court ordered a hearing in presence, and thereafter, on the 18th of June 1822, adhered to the interlocutor complained of.*

The *Lord Justice-Clerk* was of opinion,—1. That the Court could not regard the collateral evidence which had been referred to by Sir James Colquhoun, but that the question must be decided entirely by the legal import and effect of the retour itself. —2. That if the question had arisen for the first time, he would have had very great difficulty; but that a principle had been established by a series of decided cases, that although the old extent and the feu-duties were retoured separately from each other, yet if they were the same, or nearly the same in point of amount, it was to be presumed that the jury had just adopted the feu-duties as the old extent, and therefore the retour did not prove that the lands were a forty shilling land of old extent, distinct from the feu-duties;—and, 3. That that principle applied to the present case, and therefore that Mr. Douglas was not entitled to be enrolled.

Lords Craigie and *Robertson* concurred in this opinion.

Lord Glenlee, on the other hand, held that the decisions went

* See Shaw and Ball. No. 556.

no further than to show, that where the old extent and the feu-duty were retoured at the same sum, the retour was to be considered as not sufficient to establish that the lands were of the requisite valuation; but that here the old extent was retoured at one sum, and the feu-duty and the new extent at another and a different sum, and therefore these cases did not apply to the present one. And as there was a distinct and separate answer made in terms of the statute 1681, the retour was effectual to prove that the lands were of the requisite valuation, and it was not competent to go into collateral evidence to redargue this. July 16. 1823.

Lord Bannatyne concurred in this opinion.

Mr. Douglas having appealed, the Lord Chancellor moved, and the House of Lords ordered and adjudged, that the interlocutors complained of be affirmed.

Appellant's Authorities.—(1.)—1594, c. 233; 1597, c. 281; 2. Craig, 17. 36; Balfour, 430; Skene de Verb. Sig. voce Extent; Freeholders of Linlithgowshire, June 14. 1746, (8574, see also the Notes of L. Kilkerran's Session Papers, Adv. Lib. No. 64, and Elchies' Notes, p. 268); Freeholders of Perthshire, June 24. 1747, (8576); Kerr, Nov. 10. 1747, (8577, and Elchies, No. 49. M. P.*); 3. Ersk. 8. 66.—(2.)—Cranstoun, May 16. 1816, (F. C.); Gibson, June 13. 1818, (F. C.); Nicolson, May 15, 1819, (F. C.)

Respondent's Authorities.—(1.)—2. Craig, 17. 29; 3. Ersk. 8. 67; 2. Ersk. 5. 33; 1457, c. 71; 1503, c. 90; 2. Craig, 17. 36; Dallas, 886; 1594, c. 229; 1597, c. 277; Freeholders of Linlithgow shire and Perthshire, ut supra; Hamilton, Jan. 19. 1745, (Elchies, No. 23. M. P.); Kerr, Nov. 10. 1747, (ib. No. 49); Dickson, Nov. 10. 1747, (ib. No. 48.)

H. RIDDELL,—SPOTTISWOODE and ROBERTSON,—Solicitors.

(*Ap. Ca. No. 25.*)

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* In Lord Elchies' printed report it is said that 'both the old and new extent were retoured to 7 merks and 4 pence, and the feu-duty to 7 merks and 40 pence;' but it was stated by the appellant that this was an error, as it appeared from the printed retours, p. 4, that instead of 4 pence it was 40 pence, and that the retour added, 'et valuerunt tempore pacis summam antedictam.'

No. 68. Sir JAMES DUFF, Appellant.—*Warren—Thomson—Moncreiff.*
EARL of FIFE, Respondent.—*Gifford—Clerk—Cranstoun—Jeffrey—Murray—Cockburn.*

Title to Pursue—Writ—Stat. 1597, *c.*185.—Held,—1.—(affirming the judgment of the Court of Session,) That a party who was served heir of line to the granter of an entail and trust-deed, was not prevented from reducing them by the existence of a prior entail and trust-deed, under which he was called as an heir of entail, but excluded from possessing during his life; and,—2.—(reversing the judgment,) That blindness was not per se a legal incapacity from signing a deed; and that such deed being ex facie probative, it was incumbent on the party objecting to show that it had not been executed in terms of the statutes.

July 17. 1823.
2D DIVISION.
Lord Pitmilly.

THE late James Earl of Fife succeeded in 1765 to entailed estates belonging to the family, and during the course of his life acquired by purchase extensive landed property, the titles of which he took to himself in fee-simple. His immediate younger brother was the Honourable Alexander Duff, who had a son, James, the present respondent. The Earl had no lawful issue; but he had a natural son, Sir James Duff, the appellant.

In 1789 his Lordship executed an entail of his fee-simple estates, by which he disponed them 'to myself and the heirs-male 'of my body; whom failing, to Alexander Duff, my eldest bro-'ther-german, and the heirs-male of his body; whom failing, to 'George Duff, my second brother-german, and the heirs-male of 'his body; whom failing, to Ludovic Duff, my third brother-'german, and the heirs-male of his body;' whom failing, a series of twenty-two nominatim substitutes, and the heirs-male of their bodies; 'whom all failing, to the other heirs-male of the deceased 'William Duff of Braco, my father's cousin-german; whom fail-'ing, to the heirs whatsoever of my body; whom failing, to the 'heirs whatsoever of the bodies of the haill heirs of entail and 'substitutes above specified, according to the order above set 'down; whom failing, to my own nearest heirs and assignees.' He reserved to himself full power to make such alterations as he thought fit; and it appeared that he had intended at the same time to execute a relative trust-deed, for the purpose, inter alia, of limiting the right of possession of his brother Alexander, and his son, the respondent; but no such deed was actually executed till 1797. In that year he conveyed the rents of his estates to trustees for payment of his debts, and subject to a declaration that his brother Alexander and the respondent should, during their lives, be restricted to an annuity, not to exceed £1000, and that the trust should subsist during their respective lives.

On the 28th of November 1801 he executed another trust-deed,

by which he disponed his estates, both heritable and moveable, to the appellant, Sir James Duff, for purposes similar to those in the previous deed; but it was provided 'that this present trust 'shall also subsist and be effectual, to all the intents and purposes 'herein expressed, during the whole lifetime of the above-designed 'Sir James Duff; or, in the event of his death before the purposes 'of this trust are carried into effect, for and during the space of 'two years from and after the period of all the said debts and ob-'ligations, funeral charges, legacies, and donations, and whole pur-'poses of the trust of every kind, being fully cleared, extinguish-'ed, and fulfilled in pursuance of these presents; and I hereby 'supersede and suspend all right, title, and interest whatsoever 'competent to the heirs and substitutes of entail called or to be 'called to succeed to me in the said lands, estates, and property 'above described, by virtue of the deeds of entail above speci-'fied, and any other deed or deeds of entail to be hereafter exe-'cuted by me, for and during the whole period of subsistence 'of the present trust, as above expressed: Declaring that the 'whole rents, maills, profits, casualties, and issues of the said 'lands, estates, and property, shall, during the foresaid space, 'exclusively belong to and be intromitted with by my said 'trustees or trustee surviving and accepting as aforesaid; whom 'failing, as before mentioned.' July 17. 1823.

In both of these trust-deeds he reserved to himself full power to revoke and alter at pleasure.

On the 7th of August 1802 he executed a declaration and obligation, proceeding on the narrative of the deed of entail in 1789, and relative trust-deeds in 1797 and 1801, and that he was determined to exercise the powers therein reserved to him. He then introduced this clause:—'Therefore wit ye me to have acknow-'ledged and declared, likeas I do hereby testify, acknowledge, 'and declare, that the foresaid trust-disposition and settlement 'executed by me as above mentioned, and the whole clauses, ob-'ligations, provisions, powers, stipulations, conditions, and declar-'ations therein conceived, shall, in addition to the periods of en-'durance therein and before specified, remain, subsist, and be 'effectual to and for all the ends, uses, intents, and purposes 'therein expressed, during the whole lifetime of James Duff, my 'nephew, son of the Honourable Alexander Duff of Echt, my 'immediate younger brother, in the event of his surviving me, 'and succeeding to the other entailed estates and property, inde-'pendent of those specified and described in the said trust-dispo-'sition and settlement, by and in virtue of the deeds of entail 'executed by the deceased William Earl of Fife, my father; and

July 17. 1823. 'I hereby seclude and debar the said James Duff from ever succeeding to, or holding possession of the whole or any part of the lands, estates, and property belonging to me, and described in the foresaid trust-disposition and settlement, by virtue of the deeds of entail, or any other deed or writing whatsoever executed or to be executed by me, calling the said James Duff to the said succession, in any manner of way; all which deeds of entail executed or to be executed by me, with all right, title, and interest whatsoever competent to the said James Duff, or the heirs and substitutes of entail, are hereby declared to be also superseded and suspended, and rendered ineffectual during the whole lifetime of the said James Duff accordingly. And further, I hereby give, grant, and confer to and upon the said trustees or trustee named and appointed by me in the foresaid trust-disposition and settlement, (but under the revocation expressed in the deed of alteration executed by me as above mentioned,) surviving and accepting as aforesaid,—whom failing, as before mentioned, all and whatsoever further powers and authority which may be essential, requisite, and necessary for their and his remaining fully vested in the said lands, estates, and property therein described, and for continuing and preserving the said trust thereby created entire and undiminished in their and his persons or person, to and for the ends, uses, intents, and purposes therein expressed, during the whole lifetime of the said James Duff, in addition to the periods of endurance therein and before specified, and that equally and effectually, and in the same manner as if the said trust, and the provisions and stipulations thereof, had been declared to subsist and remain effectual and obligatory, during the lifetime of the said James Duff, in the foresaid trust-disposition and settlement itself; and I hereby bind and oblige myself, my heirs and successors, to make, grant, subscribe, and deliver to and in favour of my said trustees or trustee, surviving and accepting as aforesaid, whom failing, as before mentioned, all writs and deeds which may be requisite and necessary for carrying my intention into full and complete effect, to all intents and purposes whatever; and I hereby declare that these presents shall have reference to, and be held to make a part of, or an addition to the said trust-disposition and settlement above recited.'

By the same deed he declared, 'That as it may be of importance that the said Honourable Alexander Duff and James Duff, and other heirs of entail and substitutes succeeding during the subsistence of the trust, should, immediately upon the succession

'to the foresaid lands and others opening to them respectively, 'complete titles in their persons to the said lands and others under the entail, and obtain themselves publicly infeft therein; and 'that they should afterwards concur with the trustees under the 'foresaid trust in granting charters, precepts of clare constat, and 'other writings, to vassals in the said lands and others, presentations to churches, tacks or leases, heritable bonds, and the like;' he appointed them to make up titles in their own persons, and concur with his trustees in granting charters, &c. to vassals and others. He afterwards, on the 23d of November 1805, addressed a letter of directions to his trustees, giving them certain orders as to the administration of his estates. July 17. 1823.

Subsequent to this period, the Earl acquired additional lands, and he formed the resolution of executing a new trust-deed, and a new deed of entail. Accordingly, on the 7th of October 1808, he made two deeds of that description, by which he recalled all those previously executed by him; 'but declaring and providing 'always, that if, by reason of any legal objection to these presents 'in any way other than by a revocation by myself, or by my authority, the same should not be effectual, but should be reduced 'or set aside in whole or in part, then the said former trust-disposition, deed of alteration, declaration and obligation, and letter of directions, shall still remain in full force, in so far as these 'presents may be effectual, but not otherwise, and no further.' By the trust-deed he conveyed his whole estates and effects to the appellant Sir James Duff, Thomas and Richard Whartons and Stewart Souter, Esqrs., declaring that the appellant should be a sine quo non. Into this deed he also introduced a clause in the same terms as that above quoted, excluding his brother Alexander and the respondent from the possession and enjoyment of the estates during their respective lives. By the deed of entail he destined the estate to himself and the heirs-male of his body; 'whom failing, to the Honourable Alexander Duff of Echt, my 'eldest brother-german, and the heirs-male of his body; whom 'failing, to Lieutenant-General Sir James Duff of Kinstair, and 'the heirs-male of his body;' whom failing, to the heirs of entail in the deed executed in 1789, among whom were the heirs-female of his brother Alexander, and the heirs-male of his body.

These two deeds were of great length, each extending to upwards of eighty pages, and each of them had a testing clause in these terms:—'In witness whereof I have subscribed these pre-'sents, written upon this and the eighty-one preceding pages of 'stamped paper by James Gibb, clerk to William Inglis, writer 'to the signet, at Duff-house, the 7th day of October 1808 years,

July 17. 1823. 'before these witnesses, Alexander Forteath Williamson and 'George Wilson, both residing at Duff-house,—the place, date, 'and witnesses' names and designations being written by the said 'George Wilson.' On each page accordingly there was subscribed his Lordship's signature 'Fife.'

On the 12th of November of the same year he executed a deed altering in some respects the trust-disposition of the 7th of October 1808, but declaring that in other respects it should subsist and be effectual. The testing clause of that deed of alteration was in these words:—'In witness whereof these presents, written on this 'and the three preceding pages of paper legally stamped, by the 'said Stewart Souter, at my desire, are subscribed by me at Duff-'house the 12th day of November 1808 years, before these wit-'nesses, Alexander F. Williamson and George Wilson, at Duff-'house.'

His Lordship soon thereafter went to London, where he died on the 26th of January 1809, in his 82d year. He was succeeded by his brother Alexander, who was, by the above deeds, excluded from the enjoyment of the trust-estates. No reduction was brought by him of these deeds, and the trustees immediately entered into possession in virtue of them. Earl Alexander died in April 1811, and his son, the respondent, then obtained himself served as nearest and lawful heir in general of the late Earl James. In that character he brought an action of reduction in 1814, in which he called for the deeds of trust and entail of the 7th of October 1808, and concluded that they should be reduced, on the ground, first, That the late Lord Fife, at the time of executing the deeds, was blind to such a degree as to be incapable of distinguishing objects, and it was therefore legally incompetent for him to execute such deeds by his own subscription; and that he could only legally do so by the intervention of two notaries and four witnesses; second, That his Lordship was assisted in making his subscriptions to the said deeds; third, That the deeds had not been read over to him at the time of signing them; and, fourth, That one of the instrumentary witnesses did not see him subscribe, nor hear him acknowledge his subscription.

Against this action the trustees gave in these defences:—

'1. The pursuer has no title to insist in the present action, in 'respect that he has no legal interest to set aside the deeds there-'by challenged, any interest which he might otherwise have had 'being cut off by previous deeds, particularly by a trust-disposi-'tion and settlement executed on the 28th November 1801; a 'deed of declaration and assignation executed on the 7th August '1802, and a letter of directions written on the 23d November

'1805, all by the said deceased James Earl of Fife, and not 'challenged in the present action; and by the express terms of 'the trust-deed now challenged it is declared, that in case it shall 'happen that by reason of any legal objections, or in any way 'other than a revocation by the granter, the said trust-settlement 'shall not be effectual, the former deeds shall still remain in full 'force, in so far as the said settlement may not be effectual. As 'the effect of reducing the deeds called for in this reduction could 'only be to revive those former settlements, by which the interest 'of the pursuer is wholly excluded, it is evident that he has no 'interest to prosecute the reduction, and consequently no legal title 'to insist;—and, 2. Even supposing that the pursuer had a sufficient title and interest to insist in the reduction, the deeds called 'for are not liable to challenge on any ground whatever, and the 'reasons of reduction libelled are entirely without foundation.' The Lord Ordinary repelled 'the preliminary defence of want 'of title and interest in the pursuer to insist in the present action,' and appointed him to give in a condescendence of the facts he alleged in support of his reasons of reduction; and to this interlocutor the Court, on the 16th of January 1816, adhered.* July 17. 1823.

Thereafter the following issues were prepared, approved of, and remitted to the Jury Court:—

1st, Whether, at the date of the deeds under reduction, viz. on the 7th of October 1808, James Earl of Fife deceased was totally blind, or was so blind as to be scarcely able to distinguish between light and darkness? and whether the said Earl was at that time incapable of reading any writing, written instrument, or printed book? and if at that time he could discover whether a paper was written upon or not?

2d, Whether the said deeds were read over to the said Earl previous to the said Earl's name being put thereto? and if so, in presence of whom? and if read over to the said Earl as aforesaid, whether they were all, or any of them, read to him at one and the same time, or at different times? and if at different times, whether they were deposited and kept in the room in which they were read, during the whole period which elapsed from the commencement of the reading till the name of the said Earl was put to them as aforesaid, or where they were deposited?

3d, Whether the said Earl's name was put to the said deeds, or any of them, by having his hand directed to the places of signing, or led in making the subscription? or if the said Earl was as-

* Not reported.

July 17. 1823. sisted, and if so, in what manner he was assisted, in making his subscription?

4th, Whether the said Earl put, or attempted to put, his name to the said deeds, or any of them, at one and the same time, or whether any period of time intervened? and if there were any interval or intervals of time between the said acts, whether the said deeds, and all of them, were in the possession or custody of the said Earl, or were in the possession or custody of any other person, during such intervals of time?

5th, Whether the said Earl put his name to the deeds under reduction in presence of the two instrumentary witnesses, or either of them? or did acknowledge his subscription to them, or either of them, or at what period he made such acknowledgment?

6th, Whether the said Earl was, until the dates of the deeds under reduction, or at a later period, a man remarkably attentive to, and in the use of transacting every sort of business connected with his estates, and in the practice and habit of executing, and in fact did execute, deeds of all sorts connected with his own affairs, by subscribing the same with his own hand, and without the intervention of notaries?

7th, Whether the said Earl took means to ascertain that the deeds under reduction, alleged to have been signed by him, were conform to the scrolls of deeds prepared by his agents under his special direction, and what were the means he took to ascertain the same?

Upon these issues the Jury returned the following verdict:—

As to the first issue, That James Earl of Fife, at the date of the deeds under reduction, viz. on the 7th of October 1808, was not totally blind, though he could scarcely distinguish between light and darkness. The said Earl was at that time incapable of reading any writing, written instrument, or printed book. He could not at that time discover whether a paper was written upon or not.

As to the second issue, That the said deeds were read over, previous to the Earl's name being put thereto, in presence of Stewart Souter and Alexander Forteith Williamson, or one or other of them. It is not proven whether they were all read to him at one and the same time, or at different times, but one was read at the time that the deeds were signed. There is no proof whether they were deposited and kept in the room in which they were read, during the whole period which elapsed from the commencement of the reading till the name of the said Earl was put to them as aforesaid, or where they were deposited.

As to the third issue, That the said Earl put his name to the

said deeds, by feeling for the finger or fingers of another person on the spot for signature, and was no otherwise assisted than as above described. July 17. 1823.

As to the fourth issue, That the said Earl put his name to the said deeds at one and the same time.

As to the fifth issue, That the said Earl put his name to the deeds under reduction in presence of one instrumentary witness, viz. Alexander Forteith Williamson; but it is not proven that the said Earl did acknowledge his subscription to George Wilson, the other instrumentary witness.

As to the sixth issue, Proven in the affirmative.

As to the seventh issue, That the only means which the said Earl took to ascertain that the deeds under reduction were conform to the scrolls of deeds prepared by his agents under his special directions, were his having heard the said deeds read over to him.

Lord Fife then applied for a new trial on the second issue, which having been granted, the Jury returned this verdict:—That in respect of the matters of the said issue, it has not been proven that the deeds under reduction were read over to the said Earl of Fife previous to the said Earl's name being put thereto.' The case having then been returned to the Lord Ordinary, he pronounced this interlocutor:—'Finds that a person about 'to execute a deed of importance, who, at the time of the exe-'cution of it, is, in the words of the verdict in this case, 'not "totally blind, though he can scarcely distinguish between light "and darkness, and is incapable of reading any writing, written "instrument, or printed book,' and cannot discover whether a 'paper was written upon or not, and who can only put his name 'to the deed by feeling for the finger or fingers of another per-'son on the spot for signature, is not only entitled in law, but 'ought to execute the deeds by means of notaries and witnesses, 'in terms of the act 1579, cap. 80; but finds that there is no 'sufficient authority in the law of Scotland for concluding that 'a deed signed by a person in the situation above described, in 'presence of two witnesses, in the usual manner, is null, or can 'make no faith, provided the deed be proved to have been dis-'tinctly read over to the granter, in presence of the witnesses, 'immediately before the subscription is made, in order to afford 'that degree of evidence which the law requires, and which is 'plainly necessary to show that the deed given to the granter to 'subscribe is truly, in all its parts, the deed which he intended 'to execute: Finds that the fact of the deed subscribed by a 'blind man having been read over to him in presence of the wit-

July 17, 1823. 'nesses before subscription, is not a fact which is to be presumed 'in law from the attestation of the witnesses to the fact of his 'having subscribed the deed, but that the fact of the reading 'over must be proved by the user of the deed when it is disputed: 'Finds that it has been established by the verdict of the Jury 'on the second trial, that it has not been proven that the deeds 'under reduction were read over to the said Earl of Fife pre- 'vious to the said Earl's name being put thereto, and finds that 'the deeds are on this ground reducible: Therefore sustains the 'reasons of reduction, and reduces, decerns, and declares in terms 'of the libel.'

To this interlocutor the following note was subjoined:—

'It is proper for the Lord Ordinary to explain in a note why 'he has not taken notice in this interlocutor of the separate ob- 'jection to the deeds under reduction, on which a great deal of 'argument is bestowed in the memorial, founded on the allega- 'tion that the late Earl of Fife did not acknowledge his subscrip- 'tion to George Wilson, the instrumentary witness, who was not 'present when the subscription was adhibited. The Lord Ordi- 'nary's opinion on this point is, that the presumption of the law 'is, in this particular case, in favour of the deeds; but as it has 'been established by the verdict that the granter of the deeds 'was incapable of reading any writing, and could not discover 'whether paper was written upon or not,—and as it has also been 'established by the verdict that the Earl put his name to the 'deeds in presence of one only of the instrumentary witnesses, 'so that the acknowledgment of his subscription to the other in- 'strumentary witness, which is presumed to have been made, 'must have been made by a person who could not see the sub- 'scriptions (upwards of 160 in number) intended to be acknow- 'ledged by him,—the Lord Ordinary thinks that the manner in 'which the subscriptions are attested, gives rise to an important 'objection against the validity of the deeds. If the verdict had 'established that the deeds remained in the actual personal pos- 'session of the granter till after the time when the acknowledg- 'ment of the subscriptions may have been made, the objection 'alluded to would have been the less important. If, again, the 'verdict had borne that the deeds were taken out of Lord Fife's 'hands immediately after the subscriptions were written, and be- 'fore his Lordship had an opportunity of meeting with Mr. Wil- 'son, and of acknowledging his subscription to him, the objec- 'tion to the attestation of the subscription would have appeared 'more formidable, if not decisive. In referring to the case of 'Coutts against Straiton, Lord Bankton makes an important ob-

'servation, in a passage not noticed in the memorials, B. 1. tit. 11. July 17. 1823.
'sect. 38.'

Both parties having represented, his Lordship reported the case on informations to the Court, 'in respect of the great im-'portance of this case in point of law, and that although the opi-'nion expressed by the Lord Ordinary in the interlocutor repre-'sented against remains unaltered, yet it will be more convenient 'for the Court, and more for the advantage of the parties, that 'the whole cause should be stated and argued in one paper on 'each side.'

On advising these informations, the Court adhered to the interlocutor of the Lord Ordinary, 'in so far as it sustains the rea-'sons of reduction of the trust-disposition, and reduces and de-'cerns as to these deeds.' Against this interlocutor a short petition was lodged by the trustees; and leave having been given to put in a full one, this was done by the appellant Sir James Duff alone, the other trustees having withdrawn from the contest; and on advising it, with answers, the Court, on the 30th of November 1819, adhered. *

Sir James Duff then appealed, and contended,—

1. That the respondent, Lord Fife, had no title or interest to insist in the action, seeing that, as he had not attempted to reduce the prior trust-deeds, by which he was excluded from the possession of the estates, and as it was declared that if those in question were set aside, the prior deeds should revive, and have full effect; and as the action was brought by him, not in the character of heir of tailzie under the entail of 1789, but as heir of line of the late Earl James, he could derive no advantage by setting aside the present deeds, and consequently had no interest to do so.

2. That, by the statute 1579, c. 185, it was enacted, that all deeds of importance 'sall be subscribet and seillet be the 'principal parties, gif they can subscryve, utherwise be twa fa-'mous nottaries, before four famous witnesses, &c., utherwise the 'saides writtes to mak na faith.' That by this enactment, therefore, it was expressly declared, that if the party could subscribe, the deed must, under the penalty of nullity, be signed by him, and not by notaries; and that it was only in the case where the party could not subscribe that it was lawful to have recourse to the assistance of notaries: that it was proved, not only by the terms of the verdict, but by other written evidence in process,

* See Fac. Coll. 30th November 1819, for the opinions of the Judges.

July 17. 1823. (to which it was perfectly lawful to refer, so far as not inconsistent with the verdict,) that the Earl came within the general rule, as being able to subscribe his name, and had actually done so to the deeds in question: that although it was established that he was so blind as not to be able to distinguish the paper on which he wrote, yet there was no rule prescribed, either by statute or by law, declaring that a blind person should not be allowed to subscribe, if he had the power of doing so; and that although the circumstance of being blind might be of importance in a question of fraud, yet no such averment had been made in this case.

3. That as the deeds were ex facie executed in terms of the statutes, and therefore were of themselves probative, it was incumbent on the party attempting to set them aside, and founding on objections not appearing on the face of them, to establish positively by evidence those objections, whereas the verdict merely found that those circumstances which it was necessary for the respondent to establish were not proven, which amounted merely to an answer by the Jury of ignoramus.

On the part of Lord Fife it was answered,—

1. That, before inquiring whether his title and interest to insist in the action were cut off by the previous deed of entail and relative trust-deeds, it was necessary for the appellant to show that *he* had such a title and interest in these deeds as to give him a right to make the objection: that by these deeds the appellant had no right whatever in the lands as an heir of entail, but merely as a trustee: that it was his duty in that capacity rather to concur with the respondent in setting aside the entail and relative trust-deed in question, as thereby other substitutes and other burdens were introduced, to the prejudice of those for whom he was trustee, and who had right under the former entail; but that, supposing the appellant was entitled to make the objection, still the respondent had both a good title and interest:—first, Because, as he had been served and retoured heir of law of the late Earl, he had an unquestionable title to reduce every deed executed by him affecting the estates, and prejudicial to the heir, on any competent ground of law, and of course to set aside any one whereby his access to the estates might be impeded, provided the deeds not brought under reduction did not absolutely exclude him, and gave an absolute right to his opponent, which in this case they did not:—second, Because the respondent was expressly called as an heir of entail under the former deed, in the character of heir-male of the body of his father, and the trust-deed did not deprive him of that character, but merely suspended his right to *enjoy* the estate, and to enter to *possession* of it; and accordingly he was or-

dained to make up titles to the property, so that, as an heir of entail, he would be entitled, among other rights, to be enrolled as a freeholder, and to object to subsequent deeds on any available ground: —and, third, Because although the respondent was no doubt heir of tailzie under the former deed, yet, as he also possessed the other character of heir-at-law, he was entitled to bring his action upon either of these titles which he thought fit. July 17. 1823.

2. That at common law a party who was blind could not legally sign a deed,—a rule which had been established both from the expediency and necessity of the case:—that writing was an art to which it was essential that there should be a mind to direct, a hand to execute, and an eye to see; and although substitutes had been contrived for the hand where it had been lost, yet, where there was no mind to direct, or no eye to see, it was impossible to say that the party was possessed of the art of writing, so as to exercise it to any legal effect; and therefore a person who was deprived of sight fell within that class who were unable to subscribe their names according to law, so that the intervention of notaries was requisite.

3. That although the deeds were no doubt ex facie probative; yet, so soon as it was established that Lord Fife was blind, they lost the character of probative, and the onus probandi that they had been read over to his Lordship, and subscribed in presence of the witnesses, or his subscription acknowledged to them, fell on the appellant; and even, therefore, if blindness was not of itself an absolute incapacity to the execution of a deed, it at least required the supporter of the deeds to show by evidence that they had been executed in terms of law.

The House of Lords pronounced this interlocutor:—'The 'Lords find, That, under the circumstances of this case, notwith- 'standing the defect in sight of the Earl of Fife, proved upon 'the issues formerly tried in this cause, the signature of the in- 'struments in question by notaries was not required by the sta- 'tute of 1579, and that the signature of the Earl of Fife was the 'proper signature to give effect to those instruments, according 'to the true intent and meaning of the statute: that the signa- 'ture of the Earl of Fife appearing on the face of the said instru- 'ments, and the instruments being apparently attested by two 'witnesses, the instruments apparently so signed and attested are 'in law probative deeds; and that to impeach such instruments 'as probative deeds of the Earl of Fife, the pursuer was bound 'to prove that the witnesses, or one of them, did not see the Earl 'of Fife subscribe the said instruments respectively, or hear him 'acknowledge his subscription thereto: that to impeach the said

July 17. 1823. 'instruments respectively, though in law probative instruments, 'as the deeds of the Earl of Fife, on the ground that the Earl of 'Fife did not know the contents of such instruments respectively 'when he subscribed the same respectively, and that therefore the 'same were not respectively the deeds of the Earl of Fife, the 'pursuer was bound to prove that the Earl did not know the 'contents of such instruments respectively when he subscribed 'the same respectively: that it is not a solemnity required by law 'that the said instruments respectively should have been read 'over to the Earl of Fife at the times of the execution thereof 'respectively, or at any other time or times, and that, if such in-'struments respectively were duly executed and attested by the 'Earl, and in law probative instruments, the knowledge of the 'Earl of the contents thereof respectively must be presumed, un-'til the contrary should be shown; but that proof that the said 'instruments respectively were not read over to the Earl of Fife 'at the time of the execution thereof, is evidence to be received 'that he did not know the contents of such instruments respect-'ively, but that such evidence is not conclusive evidence that he 'did not know the contents of such instruments respectively, in 'as much as his knowledge of the contents of such instruments 'may be proved by other evidence from which such knowledge 'may be inferred: that execution by the Earl of Fife of the in-'strument purporting to be a deed of alteration of the deed of 'trust-disposition, sought to be reduced, supposing such deed of 'alteration was executed and attested according to the statute, 'and that the Earl knew the contents thereof, is evidence to be 'received to prove that the Earl of Fife did know the contents of 'such trust-disposition and deed of entail respectively at the time 'when such trust-disposition and deed of entail appear on the 'face thereof to have been signed by the said Earl: that the ver-'dicts of the several Juries upon the several issues directed by 'the Court of Session were in some respects inconsistent, and are 'insufficient to warrant the interlocutors reducing the said instru-'ments of trust-disposition and deed of entail respectively: that 'the question properly in issue on the summons of reduction was, 'whether the instruments sought to be reduced, though appar-'ently probative instruments, and as such to be received as the 'deeds of the Earl of Fife, were respectively the deeds of the 'Earl of Fife? that the proof of facts to show that the instru-'ments, though probative instruments, were not the deeds of the 'Earl of Fife, ought to have been given by the respondent in 'support of his action for reduction of those instruments as pro-'bative deeds. It is therefore ordered and adjudged, that the

'said several interlocutors complained of in the said appeal, in so 'far as these relate to the title and interest of the pursuer to in- 'sist in the present action, be, and the same are hereby affirmed; 'and, in other respects, that the said interlocutors be, and the 'same are hereby reversed. And it is further ordered, that the 'Court of Session in Scotland do direct an issue to try whether 'the instruments of trust-disposition and deed of entail, both 'dated the 7th day of October 1808, sought to be reduced, being 'in law probative instruments, were not, or either of them, was 'not the deeds or deed of the Earl of Fife; and whether the deed 'of alteration of the 12th day of November 1808, being in law a 'probative instrument, was not the deed of the Earl of Fife; and 'that, upon the trial of such issue, the burden of proof that such 'instruments respectively were not respectively the deeds or deed 'of the Earl of Fife, ought to be upon the respondent seeking to 'reduce the same. And it is further ordered, that the respond- 'ent be the pursuer in such issue, and the appellant defender; 'and that, upon the trial of such issue, the said several instru- 'ments be produced, and be received as probative instruments, 'to be impeached by the respondent by such evidence as he may 'be advised to offer touching the same, and that thereupon the 'appellant be at liberty to offer such evidence as he may be ad- 'vised to offer in support of such instruments respectively; and 'for that purpose, that the appellant be at liberty to offer the 'deed of alteration of the 12th day of November 1808, as evi- 'dence in support of the instrument of trust-disposition and deed 'of entail of the 7th day of October 1808, so sought to be re- 'duced, if the appellant shall think fit so to do. And it is fur- 'ther ordered, that, after the trial of such issue, the Court of 'Session do proceed further in the cause as shall be meet.' *

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LORD CHANCELLOR.—My Lords, it is not to be supposed, that, in rising at the end of a hearing upon a case, in itself a case of very great value, and certainly of very great importance, I should be about to apprise your Lordships how, in my humble judgment, you ought to act; but feeling this case to be one that I profess distresses my mind more than almost any case I ever had to deal with judicially, it does occur to me, that perhaps it may not be improper to say a few words upon it at this moment. I will not enter at this moment into the consideration, whether, upon the true interpretation of the statutes with respect to the administration of justice in Scotland, this House could or could not now direct a more

* See, as to the future progress and ultimate decision of this case, 4. Shaw and Dunlop, No. 241. 242. 497, and Wilson and Shaw's Appeal Cases, May 22. 1826, p. 166.

July 17. 1823. general issue, or any issue, with a view to determine the question between these parties? But, unless I mistake the nature of the case, if there had been an issue directed, or if there were now to be an issue directed, in the terms in which those Courts in which I have sat are more in the habit of sending issues,—I mean a Court of Equity,—the issue that probably would have been directed would be an issue in terms somewhat like these,—namely, Whether the deeds sought to be reduced were the deeds of Lord Fife? That would have let in every objection whatever. It would have permitted a discussion before a Judge and a Jury upon the meaning of the statutes which speak of persons who cannot write; and the opinion and the direction of the Judge would have been to be given to the Jury, whether, according to the true intent and meaning of those statutes, a blind man, who can write extremely well, is nevertheless to be considered as a person who cannot write, so as to subscribe a deed? I say who can write extremely well, because it is a singular circumstance, that if you were trying the fact of my Lord Fife's having signed these deeds by a similarity of hands, you would have nothing to do but to look at that roll which now lies upon this table, on which his Lordship did subscribe the oaths and declarations, and so on, in the same year 1808, and the similarity of that writing is in truth a very strong proof—I do not mean to say a legal proof—that is another way of putting it,—but a very strong proof that the signatures of those deeds were Lord Fife's signatures. My Lords, if the Judge had directed the Jury, by telling them that, within the true intent and meaning of the statutes, a blind man cannot write, one party might have excepted to his opinion in point of law. If he told them he could write, the other party might have excepted to his opinion in point of law. So again, (to take another part of the case,) if it should turn out to be the law of Scotland, that a blind man is a man who, nevertheless, may subscribe, then another question would arise, whether, when a blind man subscribes a deed, it must be proved either that the deed was read over before the witnesses who attested it, or that it was read over at some other time; and that such reading might or not be considered as satisfactory proof that it was his deed—that which he subscribed? Upon that the opinion of the Judge might have been given to the Jury; and it would have been incumbent upon the Judge to have informed the Jury upon whom the proof lay that the deed was read. In which opinion he must likewise have been called upon to declare whether those deeds were ex facie probative or not, with a view to get at that question.

My Lords, if the reading is a statutory solemnity, he would have been bound to have told the Jury that it was a statutory solemnity. If it is not a statutory solemnity, he must have informed the Jury that it was not a statutory solemnity. So again, with respect to the acknowledgment of the subscription, if the question had arisen, upon the trial of the issue, whether it was his deed or not, it would have been incumbent upon the Judge to have said upon whom the onus of proof lay. The result, undoubtedly, would turn upon the whole of these, not that you would have had a verdict finding that this was not proven, or that that was not pro-

ven, but that you would have had a verdict declaring what the fact was; and on all these points, or most of these points, the counsel might have tendered to the Judge a bill of exceptions, which would have brought the matter (applying the act of Parliament to the subject) before the Court of Session, and there might have been an appeal from the bill of exceptions to this House. July 17. 1823.

Now, the difficulty that strikes me, (supposing we should find that we have authority to grant another issue, and supposing it should be thought fit, upon which I state myself merely hypothetically,)—but supposing we should find that we have authority to grant another issue, and supposing another issue should be granted, I profess I have not, at this moment, (speaking with all defference,) the least hope that this cause will be nearer a conclusion than it was at the time this summons was brought into the Court of Session; because, when one comes to look at the different opinions of the Judges in other cases—when one comes to look at the different opinions of the Judges in this case—and when one comes to look at the state of the law, as we find it in Mr. Bell's book;—looking to every thing which has passed since 1790, and the terms in which the different acts are expressed, it appears to me matter of absolute certainty, that, on the general issue upon this part of the case, every point might have been brought before this House by bill of exceptions, exactly in the same state, and for exactly the same species of discussion as we have now had.

My Lords, there is another thing in this case which distresses me exceedingly, and that is this:—The summons calls for a reduction of the deeds both of October 1808 and November 1808; but the Lord Ordinary, in his judgment, having given, in great good sense and propriety, (whether with good legal judgment, is another consideration,) his reasons, reduces all the three deeds,—the two deeds of October 1808, and the deed of November 1808. This he does after the trial of the issues; he therefore must have taken for granted that the issues had tendered something about that deed of November: but I cannot find, in the terms of those issues, that there is a direction to try any thing relative to the deed of November. He must have reduced the deed of November on some ground that he found in the principles on which he reduced the deeds of October 1808. Then, when the matter comes before the Court of Session, the Court of Session reduces the deeds; that is, they sustain the interlocutor of the Lord Ordinary, so far as the interlocutor of the Lord Ordinary reduces the deeds of October 1808. What the effect of that is,—whether that operates to remit again to the Lord Ordinary to consider the effect of the deed of November 1808, is a matter that will require your Lordships' consideration; but it is certainly to me a very singular circumstance, that we are not able at this moment to collect what we are to do with that deed, except by taking into consideration the sort of reasoning I am humbly suggesting to your Lordships upon this subject; and, to be sure, if you are to bring in facts and circumstances as evidence whether a blind man knew his deed; or if it is to be taken as a fact that he did alter, by an effectual deed executed in November 1808, the deeds

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which he had executed in October 1808;—the fact that he did effectually alter in November 1808 the deeds which he had executed in October 1808, cannot be stated without one's supposing, at least, that that would afford some evidence for the consideration of a Jury, that he did understand the deeds which he so altered.

My Lords, the first question that arises in the case is this, (and I take the liberty to mention it to your Lordships, because I am myself the person that suggested it,) that if the law of Scotland—I mean the act of 1540—the act of 1579—the act of 1681, and any other acts which have been alluded to, are to be so interpreted, that if a man is blind, he is therefore within the intent and meaning of these acts—a person who cannot write—then there will be no issue in fact to be tried but whether Lord Fife was blind. But that issue in fact could not have been directed, because one of the singularities in this case is, that if we affirm this judgment, (and I am not now stating whether we shall affirm this judgment or not,) we must reverse many of the opinions which have been expressed by the Judges upon this very case; because the question, whether a person who is blind is a person within the intent and meaning of those statutes which I have been alluding to, is a question on which (five Judges sitting to determine it) three have found that such a man can write within the intent and meaning of the statutes, and two of them have said such a man cannot write within the intent and meaning of the statutes. The consequence of that would have been, that if that had been the only point before the Division, that there being a finding of the Judges who were of opinion that Lord Fife was a man who could write, though blind, there would have been no necessity upon that judgment to send an issue whether he was blind, if it was the opinion of the Court, that, though he was blind, he could in point of law subscribe within the meaning of these statutes.

My Lords, I have analysed these judgments as well as I can, and I will mention them, because I know means will be taken (and I am anxious that means should be taken) to set me right, if I am wrong in my statement of facts. I apprehend that Lord Craigie and the Lord Justice-Clerk were of opinion that he could not subscribe in consequence of being blind; but that Lord Robertson, Lord Glenlee, and Lord Bannatyne were of opinion that he could, notwithstanding his being blind; and that, therefore, the opinion of the Court was, that he was a party who was enabled to write, within the intent and meaning of the statutes. I will just call your Lordships' attention, very shortly, to the words of these statutes; and here, without entering into that question, which was a little agitated between Mr. Clerk and Mr. Warren, as to what the Roman law had to do with the law of Scotland, I think nobody can possibly deny, that the doctrines of the Roman law have, to a very considerable degree, been introduced into the law of Scotland, not because it is the Roman law, but because the people of Scotland thought proper to make it part of their own law, as some of the doctrines of the Roman law form part of the law of this country, also by adoption, in the same manner. But, if your Lordships look to what were the cautions and

guards that were put upon blind men's deeds in the Roman law, I think you will collect from the cases on the table, in the year 1794, in reference to the case of Ross v. Aglianby, that the cautions the Roman law used, in respect of deeds executed by blind persons, were cautions so grave, and amounting to such securities, that it is quite ridiculous to suppose that the act of the Scottish Parliament in 1540 was meant to adopt just as much, and no more, of those cautions than it does adopt, if blind men were to be considered as men who cannot write; for all that this statute says is this—(and, by the by, it uses the word 'subscription,' and the word 'writing,' as pretty nearly synonymous, and that is an observation which, in some measure, bears upon the language of subsequent statutes.) —It says, c. 117, 'It is statute and ordained, that, because mennis seales 'may of adventure be tint, quhairthrow great hurt may be generitt to 'them that awe the samin; and that mennis seales may be feinzied, or put 'to writinges after their decease, in hurte and prejudice of our Soverain 'Lord's lieges: That, therfore, na faith be given in time cumming to any 'obligation, band, or uther writing under ane seale, without the subscrip- 'tion of him that awe the samin, and witnesses; or else, gif the partie 'cannot write, with the subscription of ane notar thereto.' So that there was to be one notary and one witness—a ceremonial which fell very far short indeed of what was required under the Roman law. July 17. 1823.

My Lords, in 1579 the next statute, c. 80, passed, which is necessary to be considered. There it was 'statute and ordained, be our 'Soveraine Lord, with advise of his Three Estates in Parliament, that all 'contractes, obligatiounes, reversiones, assignationes, and discharges of 'reversiones, or elkes thereto, and generallie all writtes importing heri- 'tabil titil, or utheris bandes and obligationes of great importance;' (and your Lordships will find in that book of Mr. Bell's, which has been so often referred to, what are considered 'obligations of great importance,' and what are not considered 'obligations of great importance,') 'to be 'maid in time cumming, sall be subscrived and seilled be the principal 'parties, gif they can subscrive, utherwise be twa famous notars, befoir 'four famous witnesses, denominat be their special dwelling-places, or 'sum uther evident tokens, that the witnesses may be knawen, being 'present at that time, utherwise the saidis writtes to make na faith.'

The statute of 1681, c. 5, is very much commented upon. It is in these words: 'Our Soveraign Lord considering that, by the custom in- 'troduced, when writing was not so ordinary, witnesses insert in writs, 'although not subscribing, are probative witnesses, and by their forget- 'fulness may easily disown their being witnesses: For remeed whereof, 'his Majestie, with advice and consent of the Estates of Parliament, doth 'enact and declare, that only subscribing witnesses, in writts to be sub- 'scribed by any partie hereafter, shall be probative, and not the witnesses 'insert not subscribing; and that all such writts to be subscribed here- 'after, wherein the writter and witnesses are not designed, shall be null, 'and are not suppliable by condescending upon the writter, or the desig- 'nation of the writter and witnesses; and that no witness shall subscribe

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'as witness to any parties' subscription, unless he then know that partie 'and saw him subscribe, or saw, or heard him give him warrand to a no-'tar or nottars to subscribe for him, and in evidence thereof touch the 'nottar's pen, or that the partie did, at the time of the witnesses sub-'scribing, acknowledge his subscription.' Your Lordships will permit me to call your attention to the words I have just read, because they describe witnesses of two sorts—the one, a witness who saw the party subscribe—the other, a witness who heard the party acknowledge his subscription; and it is not to be forgotten in this case, that it is an admitted fact that one of these witnesses, Wilson, did not see the party subscribe his name;—whether he heard him acknowledge his subscription, is a fact, with reference to which, it seems to me that I am authorised, by the finding of the Jury, to say no more than that it is not proven either the one way or the other; and it seems a form of finding which they have in the law of Scotland, particularly in criminal cases, I think, having the effect in criminal cases, with respect to the party, of acquittal, as to punishment, however it may bear upon him, more or less, in point of character. I believe I am correct in that. With respect, therefore, to this civil case, all which can be said upon it is, that it is not proven that he acknowledged his subscription. Your Lordships will see the materiality of the distinction between its being proven that he had acknowledged his subscription, or its being proven that he had not acknowledged his subscription; or, of its not being proven, whether he did or did not acknowledge his subscription,—'otherwise the saids witnesses shall be 'repute and punished as accessorie to forgerie.'

Now, if your Lordships will look at the summons in this case, and if you look at the condescendence in this case, I think you will find, both in the summons and the condescendence, not merely a statement of facts, on the ground of which, if proven or not proven, the deeds ought to be reduced, but a great deal of general reasoning mixed up with the statement of facts, for the purpose of showing the danger of blind men being permitted to execute deeds without attending to certain solemnities or ceremonies; and here I take a distinction between what is called a statutory solemnity, and a circumstance to remove doubt—deed or no deed of the party. For instance, in this case, I will say—for I think all the Judges were agreed upon this—although some say that executing before notaries and witnesses is not required in the case of a blind man, yet all say, if I understand the effect of their judgment—that it must be proved that the deed was read. They all say that; but upon whom the proof lies, becomes an extremely material question; and it seems to be an extremely material question here, because, with respect to the verdict as to read or not read, all which is found is, not that it was read—not that it was not read. (I put out of my consideration for the moment the finding upon the seventh issue.) The finding upon the second issue finds, not that it was not read to him, but that it is 'not proven' that it was read. If that be so, then it becomes a most material question upon whom the proof of reading lies? And that has necessarily introduced another

question, Whether the reading is a statutory solemnity? Now, my Lords, that a mind like mine, weak and infirm as it is, should be extremely distressed upon that, is very natural; because not only the Judges in this case differ upon that, whether reading is a solemnity necessary in the case of a blind man or not; but if you will look back to the doctrines of the Judges in the case of Ross v. Aglianby, you will find that they differ just as much upon that point, in that case of Ross v. Aglianby, as the Judges differ upon that point in this case. Some of them are of opinion that if it is not a solemnity, then the onus is one way—if it is a solemnity, the onus is the other way;—of proving the affirmative in the one case, and the negative in the other. Your Lordships, therefore, will have to look at this case as a case not in which you know whether these deeds were read or not, unless you can come to a conclusion upon the seventh issue, which will be inconsistent with the last finding upon the second issue,—not upon the ground that it is proved that it was read, or that it is proved that it was not read;—but if you are to look at the case as a case in which it has not been made out that the deeds were read, and that if those who insist upon the benefit of the deeds have laid upon them, by the law of Scotland, the obligation to prove that the deeds were read, and they have failed in making that proof, your Lordships' judgment must be one way: If, on the other hand, the objectors to the deeds are the persons to make out that they were not read, your Lordships' judgment probably must of necessity be the other way. July 17. 1823.

There is another matter which is likewise extremely distressing in this case; and that is, with respect to the acknowledgment of the subscription. And here, when one speaks of a writ being probative, it will have to be considered whether an instrument executed by a blind man is probative, in the exact sense in which you say that a writ executed by a man in possession of his power of sight, and his other faculties, is probative, if ex facie it be regularly executed; and your Lordships will have to consider, with reference to this point, that as to one of those witnesses purporting to be a witness to the signing, it is admitted now in the pleadings, I think, that he did not see the party sign. It is also clear as to that witness, that there is not even an allegation that that witness saw him sign. There is an allegation that that witness heard him acknowledge his subscription; but then the question will come to be this—supposing, on the ex facie of the deed, it is a deed that is to be probative till it is objected to, without further proof than the production of it, if those circumstances are satisfactorily proved that a man has attested it, as if he were present at the execution of that deed, who was not present at the execution of that deed; and the additional circumstance that the party was blind is proved, then the question will be, whether the quality of probative is not so far destroyed by the proof of the circumstances I am alluding to, as to throw upon the other side the necessity of proving that the deed was read? Upon that point I need not state to your Lordships, that there is a very considerable difference of opinion among the Judges.

July 17. 1823. With respect to the fact of the acknowledgment of subscription, that appears to me to be an extremely material part of the case; because, with respect to that, seven of the Judges have expressed an opinion—three of them without qualification, my Lord Justice-Clerk speaking of it with diffidence, undoubtedly; but the inclination of his opinion is this—that those deeds, in this very case, are to be taken as deeds where the onus of proving the non-acknowledgment of the subscription lay upon those who object to the deeds; and, therefore, when your Lordships come to consider how the law stands in that respect, you will have to determine whether the judgment of the majority of the Judges in that respect is right or wrong; because the necessity of determining that arises upon the form in which the Jury have found the issue, namely, that it is 'not proven' either the one way or the other. With respect to the acknowledgment of the subscription, if the onus of proving that the subscription was acknowledged lay upon those who produced the deed, then the opinion of the majority of the Judges is wrong. If, on the other hand, the onus of proving the subscription was not acknowledged lay upon the other party, the opinion of the majority of the Judges is right.

My Lords, under all these circumstances, therefore, I protest to your Lordships, that this does appear to me to be a case which requires the utmost consideration, the most patient attention, and the most anxious endeavour, if we possibly can in this place, to settle what the law is, before it ought to be sent (if it ever should be sent) to any farther trial before a Jury; and I advert, for a single moment, to the reason I gave originally, that I am quite confident there is no issue which could be sent, which would not place this case in exactly the same state as it was when the summons was first brought in the Court of Session. That is a thing which ought to be avoided, if it possibly can; and all I can pledge myself to the House for is, that, with the utmost anxiety, I will give the best consideration I can to the case. My Lords, I confess I look also to this case with something of fear and trembling, because I know so little of what has been the practice of Scotland with respect to the execution of deeds and other instruments by men who have not their eye-sight. Mr. Bell states, that it is very extraordinary, that down to the case of Ross *v.* Aglianby, they had not any case upon the subject; but I may venture to say, I think, that if the practice is that the deeds of blind men should be executed by notaries and witnesses according to the statute, the very circumstance that such is the practice ought to have considerable weight upon our minds. If, on the other hand, the practice is not so, it is impossible to describe what may be the mischievous consequences of our laying down this doctrine at this day. If we are by that to give a sanction to a doctrine which will thwart all antecedent practice, and may bring into dispute the validity of settlements and of instruments of every species that have been known in Scotland, where I presume it does happen, as it does in England very frequently, that men who have not the best advice are obliged to execute such instruments. My Lords, the general consequences of this case impose upon us the duty of ar-

rowly considering it before we presume to state an opinion upon it, as well as the particular difficulties which occur in consequence of the conflicting opinions of all the Judges, whose opinions we have been able to see in the course of the argument, or to read in the books to which we have been referred. So much for that view of the case. There is one other point, and that is really the only point with respect to which I can represent to your Lordships at present that my mind is in that state of comfort, that I may fairly say I have not the least doubt, and that is, whether Lord Fife had a title to pursue? I am very clearly of opinion that he had a title to pursue; and that is the only point on which I can tell your Lordships at this moment that I have no doubt. July 17. 1823.

LORD REDESDALE.—My Lords, I feel it to be highly proper that the most mature consideration should be given to this case, before your Lordships come to a decision, when I look at the consequences which may follow from the decision, arising out of the unfortunate situation in which my Lord Fife stood. My Lords, if solemnities are required with respect to the execution of deeds by a blind man, such as have been contended for on the one side on the hearing of this appeal, I know not what deeds of Lord Fife this may not overturn—deeds which have been acted upon for years, and on which the rights of many other persons may depend. I conceive, that in almost all cases your Lordships ought to be extremely deliberate in your judgment, because, whatever you determine, with respect to the law of the country, becomes an authority scarcely to be questioned. It may be questioned, perhaps, in the extent of it, but with respect to itself, it becomes, in some degree, equivalent almost to a legislative enactment; and, therefore, your Lordships ought not to decide hastily upon any case, but you ought deliberately to consider what is to be the effect of your decision, not only upon the particular case, but upon other cases, if it involves any question which may affect the cases; and for that reason, I think that you ought seldom to decide without taking some time for consideration upon the subject.

My Lords, in the present case, questions have arisen, which are of the utmost consequence with respect to every instrument, not executed by a blind man only, but every instrument executed by any person. You are to consider what was the effect of the first statute which appears upon the statute books upon the subject, and what was the law before the statute 1540. If I am to collect what the law was before the statute 1540 from the statute itself, I should conclude that sealing was the stamp which gave the authority to the particular instrument that it was the instrument of the party; and the advantage that might be taken of the law standing in that manner, made it necessary to have a further regulation upon the subject. As writing had then become more common, and the signature of persons capable of writing was a mode of proof better far than the proof by the seal, which might be counterfeited, as indeed writing may be counterfeited, but not with so much ease perhaps, and the seal applied without the knowledge of the party, which seems to

July 17. 1823. be the reason given by one of the statutes, it was thought advantageous to ascertain whether the party, whose deed it was alleged to be, had really delivered it as his deed, by requiring his signature to be affixed to it, wherever he could affix his signature. Now, my Lords, for what purpose was this required? for the purpose of showing, by comparison of hands, (for there could be no other purpose,) that this was the instrument of the party. If, therefore, a person is capable of so writing, that there can be a comparison; and if this can be shown to be the instrument of the party, then, I take it, the essence of the statute requiring subscription is complied with; and I take the principle to be laid down in the case where the signature was by initials, that being the known signature of the party; and it is upon that principle that that case appears to me to have been decided.

My Lords, there is a rule in the law of Scotland, rather stronger than it is in this country, with respect to instruments executed apparently with the solemnities required by the statute, and it is considered an advantage in the law of Scotland, (and without considering whether it is or not, such unquestionably appears to be the settled law of Scotland,) that an instrument produced, which, upon the face of it, is an instrument executed according to the form of the statutes, when produced, has faith given to it, in the first instance, as the deed of the party; but, my Lords, a question arises here, upon a fact which is dehors the deed, namely, the blindness. The party being blind is a circumstance not appearing upon the deed, and which cannot appear upon the deed; and it is from that circumstance that there exists in this case something dehors the deed, that gives a colour to the case which it would not otherwise have. Other circumstances might be of the same description—for instance, insanity—that is a matter dehors the deed. A deed might appear to be perfectly executed; but when you produce evidence of insanity—insanity before the deed—insanity continued after the deed—that is a circumstance which destroys, to a certain degree, as I conceive, the probative effect of the deed. Then, my Lords, in the case, for instance, of insanity, it may be alleged it was executed in a lucid interval. If insanity is once proved before and subsequent to the execution of the deed, though not carried to the very point of time when the deed was executed, then the proof of insanity, in the first case, being upon the person to impeach the deed, the proof of lucid interval must lie upon the person who supports the deed.

Now, my Lords, these considerations have weighed very much in my mind in the course of the investigation of this case; and I think we ought to look to it with a view to all such cases, because we are to look to the very principle upon which we are now to decide, whether this is or is not to be considered as the deed of Lord Fife. If I look to this circumstance, of the degree of credit due to the instrument as the deed of Lord Fife from the signature—when I look at this roll—when I compare this roll with the fac-similes which have been produced, with respect to the execution, I should have no hesitation in saying, that, if I

had seen Lord Fife put his hand to this roll, and had afterwards seen the instrument which is now in Court, I should have had no hesitation in saying, that I believe the signature to that instrument was the signature of Lord Fife. But, my Lords, that may not decide the whole of the question; it may decide that with respect to the formality required as a solemnity, according to the statute, but it will not decide the question, whether this is to be deemed the deed of Lord Fife? With respect to the question, whether it is to be deemed the deed of Lord Fife, this is a thing that is to be considered:—Was Lord Fife acquainted with the contents, and the operation of that instrument, at the time he put his name to it; and did he receive that assurance which he ought to have received, that that was an instrument with the contents of which he was so acquainted? In the execution of instruments by persons who have the perfect use of their eye-sight, especially of those persons who are very ignorant of the legal operations of the deeds, a deed must necessarily be executed, in a great degree, in the confidence which the party has in the person who prepares it. If a deed is capable of being executed by a blind man, by his subscription, or even by notaries, whether he really and truly knows the contents and effect of that deed, must depend very much upon the confidence that the individual must have in the persons who are about him at the time, who compare the deed, and read the deed; and the knowledge he himself may have of the contents of the deed when read. It therefore seems to me that much requires to be considered, upon the whole of the statement in this case, what is the degree of knowledge of the contents of a deed, which every person who executes a deed is supposed to have, blind or not blind; and in that view, I must confess that it appears to me that the subsequent deed of November has not been sufficiently attended to, in the view in which I now consider the subject, namely, so far as it may tend to show that Lord Fife had knowledge of the contents of the deed of October—for that is the use, as it appears to me, and the only use which the deed of November is capable of. I do not conceive, from the form of the instrument, that the deed of November operates at all as a deed of conveyance;—not at all; and if the deed of October did not operate as a conveyance, the deed of November could not operate as a conveyance; but the deed of November may, as it seems to me, be used to show that the deed of October did operate as a conveyance, by showing that Lord Fife did know what were the contents of the deed of October. My Lords, the question, whether the deed of October is to be considered as the deed of Lord Fife or not, is a question, therefore, as the noble and learned Lord who has addressed you has observed, which is complicated, of law and fact; that it is one of extremely difficult decision, extremely difficult for a Jury to decide. If an issue had been directed in a form which would have brought the whole question before them, with respect to the law of the case, they must have necessarily depended very much on the direction of the Judge; and then they must have had to apply, with a considerable degree of attention, the law so declared to them, to the facts which were before them; and

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My Lords, the result, however, upon the whole, is a very serious one, and involves another question, whether, if the instrument appears executed in all the forms, upon what appears upon the view of the instrument itself, would it not therefore be probative, according to the law of Scotland?—and there is matter of doubt only, whether other circumstances do not occur dehors the deed, which may tend to invalidate the presumption, whether that presumption is not in law still in favour of the instrument? That I take to have been a part of the argument strongly urged on the part of the appellant in this case; and I thought very ably urged, whether, if the instrument, upon the face of it, (put out of the question blindness, if that fact was not proved,) the instrument itself being upon the face of it probative, then the presumption of law is, that which ought to decide upon matters which are only doubtful, with respect to any thing dehors the deed. That is a consideration which I wish very much to determine in my mind before I adopt it; but I think it is very material to consider whether that is not a consideration to be adopted; but is founded, as it was insisted upon, in what has been considered as the law of Scotland.

My Lords, we have heard much of the Roman law in this case. I apprehend that no argument can be derived from the Roman law; for it is perfectly clear that the law of Scotland, previous to the statute of 1540, when sealing was used as a means of giving that authenticity that the instrument required, by the application of the seal of the party to the instrument itself, that that has no connexion with that which is considered as the Roman law upon the subject; and, indeed, if your Lordships will look through the statute upon this subject, you will see that the custom is expressly considered as that which had created the law upon the subject previously to the statute of 1540—meaning, as I apprehend, the ancient common law of the land, which, as a written law, there is no trace of.

My Lords, I believe I have now exhausted all that may be material to say at this moment,—the great object which I have in view being to prepare your Lordships to discuss in your own minds the various questions which necessarily arise in this case—to consider the importance of the case that it must decide—what is to be the rule of law in future, with respect to the execution of deeds by persons who are blind; and with respect to one point of the case—the only one I shall now attend to—I mean the acknowledgment of the signature before Wilson: With respect to that part of the case, that will apply to deeds generally, whether executed by blind men, or persons not blind. My Lords, the form of the attestation to the instrument imports that the instrument was signed in the presence of Wilson; and the noble and learned Lord who has already addressed you has adverted to that; but, my Lords, I apprehend that that is the constant form of attestation, and we ought not to infer from that that Wilson has attested what was not in law to be considered

as the fact; for the law having permitted the attestation upon the acknowledgment of the signature, and the form of attestation being the common form of attestation, it does not strike my mind that that very materially alters the case. I am sure it would invalidate half the deeds that are executed in this country, because ninety-nine times out of a hundred, I believe, the acknowledgment of the handwriting is the thing which, with respect to one of the witnesses, very often is that which gives authenticity to the instrument. It is clear the statute referred to that very circumstance. One of the witnesses saw the name written; the other did not see his name written. Now there must have been two different attestations, if it had been conceived that it should have been exactly as the fact supposes; for I think there would be danger in holding, that the form of attestation had any effect with respect to the credit that is to be given to the instrument, derived from the attestation; the fact being, that Wilson did not see the party execute it, but having heard the party acknowledge the subscription, whether that is not equivalent to the fact of seeing it? I conceive it will be my duty, having said thus much, to consider the whole of the case; and whenever I shall come to a decision upon it, I am sure it will be a decision in fear and trembling; for, whichever way I may decide the case, I shall have great doubt what may be the future consequences. Whatever your Lordships may decide, must stand as the rule, in a considerable degree, of the Court below in future cases, and as the law of the country, unless the Legislature think fit to declare that the law is otherwise. July 17. 1823.

With respect to the title to pursue, I see no difficulty. The same character of heir, in my mind, gives my Lord Fife a title to pursue. He has a title to pursue, for the purpose of voiding the deeds, and prior deeds; but for no other purpose. Having voided this deed, he will have a right to void others; but independent of that, supposing they were to stand, he has still a right in the character of heir-at-law. He has, I apprehend, the legal estate in him, under the former deeds; he is the person in whom the estate must be, though the beneficial interest is taken out of him by the understanding of former deeds. But be that so, still, if he has an interest as the ultimate heir, he may pursue; and therefore I cannot conceive that there should not be a right in him to pursue, however remote the interest he may have may be, and however problematical; but if it was for no other purpose than to remove this deed, in order to get at the others—and I do not conceive that he is bound, in the shape of reduction, to reduce the other instruments; at the same time, any proceedings he thought fit, from interested motives of his own, to adopt, to homologate those instruments,—I do not see why he might not do it. The circumstances of prior deeds might be such as to induce the heir to reduce the subsequent instruments, and homologate them. I do not see there can be any objection to it upon that ground.—Adjourned.

LORD CHANCELLOR.—My Lords, your Lordships having appointed the further consideration of the cause of Sir James Duff and others, appellants, and James Earl of Fife, respondent, to be entered upon this

July 17. 1823. morning, it would have been extremely satisfactory to me, as I have no doubt it would have been to your Lordships, if I could have represented the case to stand before you in such circumstances, and in such a point of view, as that your Lordships should proceed at once to give a final judgment upon it. The case, however, is a case of so much importance, and, as it appears to me, a case of so much difficulty, that I find it necessary, first, to state to your Lordships the facts of the case; and, secondly, to bring under your Lordships' consideration what it may be fit to do with respect to the doctrines which are contained in the interlocutors complained of.

My Lords, the view I have taken of this case obliges me to say, in the outset, that I cannot hope to make further progress in the course of this morning, than to state the circumstances of the case, and to state generally what are the considerations that will require your Lordships' attention, meaning on Friday morning, with your Lordships' permission, to go through the examination of the several cases which relate to the doctrines that are laid down in the present case, with a view to see what it may be fit to do with the present case, if we can neither affirm nor reverse the interlocutors complained of—what we are to do with a view to bringing the case to that issue to which it ought to be brought, consistently with your power as a Court of Appeal.

The cause originated by a summons, which your Lordships will find to be a summons to the following effect:—I state the effect of it, because it cannot be necessary, I think, to go through the reading of the whole of the instruments which are stated in that summons, two of which, I think, bear date in October 1808, and one (which appears to me to have been hardly noticed, although it deserves very great notice and attention,) of November 1808.

The summons of reduction is a case in which the Earl of Fife is pursuer, against Thomas Wharton and others, defenders. It calls for the reduction of the deed of the 7th of October 1808, which deed it sets forth at full length. It then states another deed of the same date, the 7th of October 1808, the one of which it calls a trust-disposition and settlement, and the other it calls a deed of entail; and then it mentions a deed of the 12th day of November 1808, which it represents as a deed of alteration on the foresaid trust-disposition and settlement executed by the deceased Earl. It then calls for all other instruments relating to this entail, particularly stated; and it prays a reduction of all those instruments, that they may be declared to be of no avail, for the following among other reasons:—'First, That the trust-disposition and settlement, 'the deed of entail, and also the deed of alteration'—I beg your Lordships' particular attention that it prays the reduction of the deed of alteration, as well as the reduction of the trust-disposition and settlement, on the ground that 'the said deeds and other writings called for are vitiated 'and erased in substantialibus'—because they have not been executed according to the solemnities required by law. Secondly, it calls for the reduction of those instruments, including the deed of alteration, as not

having been subscribed before and in presence of the two persons who appear to have subscribed their names thereto as instrumentary witnesses, and that those persons did not hear the Earl of Fife acknowledge his subscription to either of the three deeds. It then alleges a third reason of reduction, namely, that many years before the time of executing the trust-disposition and settlement, the deed of entail, and the deed of alteration, the Earl had become blind: that when the deeds were executed, he was blind to such a degree, that he could hardly distinguish between light and darkness: that he was totally incapable of reading the deeds, or any writing or instrument whatever, or any printed book, or even of distinguishing, by means of sight, between one object and another; so that one deed might have been placed before him for another, and signed by him for such other deed, while it was impossible for him to know the difference. Your Lordships observe, the form of this allegation is, that he was blind, and incapable of reading deeds; and then they state as the consequence, not what was done, but what might have been done; so that one deed might have been placed before him for another, and signed by him for such other deed, while it was impossible for him to know the difference; and yet the said trust-disposition and settlement, and the deed of entail, and the deed of alteration, were executed by the Earl of Fife, without the assistance of notaries. This third reason, therefore, seeming to import that because the execution of them by the Earl of Fife in his circumstances might lead to imposition, the deed ought to have been executed with the assistance of notaries. The fourth reason is, that the Earl of Fife, being blind as aforesaid, was assisted in subscribing the trust-disposition and settlement, the deed of entail, and the deed of alteration, by a person who directed his hand to the place where he was to sign each page of the deeds, and to the places where he was to sign certain marginal notes written on different parts of the deed of entail: that the person told his Lordship when the pen wanted ink, and filled the pen with ink when it was wanted, the said James Earl of Fife being incapable, from blindness, of executing the deeds without such direction and assistance:—this fourth reason for reducing the deeds, meaning, therefore, to hold out, that if such was the case in that respect, and such his incapability of writing without this direction of his hand, and other circumstances, it ought to be reduced. Then follows the fifth reason:—'That the trust-disposition and settlement, and the deed of entail, and 'the deed of alteration, were not read over to the Earl of Fife, before sub-'scribing, in the presence of the two instrumentary witnesses.' And if that reason went no further than the words which I have read, it would seem to be implied, that unless the deeds were read over to the Earl in the presence of two instrumentary witnesses — if they had been read over to the Earl by twenty persons, one after another,—the deed would not have been a good deed. Then follows, however, another allegation, which is most material:—'That the said James Earl of Fife had no 'means of knowing what were the contents of the said three deeds, or 'of the marginal notes, before he signed them: that the said deeds, or

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'other deeds in their place, were read over to the said James Earl of Fife 'at different times; and between the different readings they were laid 'aside, and he had no means of knowing that the same deeds were 'brought back and read to him, or that the whole was read, or that no 'alteration was made upon the same between the different readings; and 'the said deeds, or other deeds in their place, were subscribed by the said 'James Earl of Fife at different times, and between the times of sub-'scribing they were laid aside, and that he had no means of knowing 'that the same deeds were brought back to him to be subscribed, or that no 'alteration was made upon the same between the different subscribings;' and therefore the summons prays, 'that for this and' (according to their terms of pleading) other reasons to be proponed at discussing hereof, the trust-disposition and settlement, the deed of entail, and the deed of alteration, with all instruments consequent upon them, should be reduced. Then there are the usual terms of praying the reduction, and likewise making the payment of sums of money, for the reasons usually stated in the Courts of Scotland.

My Lords, with the first defence that was taken to this summons I shall not trouble your Lordships a single moment. It is, however, a defence which was urged certainly with very great ability, and which was met again on the other side with very great ability by the counsel who wrote the papers on each side;—I mean the allegation in defence, that the pursuer had no title to pursue. As I shall be obliged to detain your Lordships, I fear, a considerable time upon the other parts of the case, I will merely refer your Lordships to what is stated upon that subject, only stating that I am satisfied the judgment in the Court below is right upon that point; and that the pursuer, for those reasons which are stated, and others, must be taken to have a good title to pursue. That being disposed of, your Lordships will find that the course which the things have taken is what I am now about to represent to your Lordships.

The preliminary defence of want of title and interest in the pursuer to insist in the present action being disposed of, Lord Pitmilly, by the interlocutor which is the first appealed from, appointed the pursuer 'to 'state in a condescendence, in terms of the act of sederunt, the facts 'he alleges and offers to prove in support of his reasons of reduction; 'allows the defender to see and answer the condescendence when given 'in; the answers to be framed also in terms of the act of sederunt;' and to this interlocutor his Lordship adhered, upon advising a representation and answers. The cause then proceeded, further, to the extent of an interlocutor being pronounced by the Lords of Session. There had been a petition on the part of the trustees brought before the Lords of the Second Division. They refused the petition, and adhered to the interlocutor complained of. This brought the cause before his Lordship upon the merits of the grounds of reduction, and there are various grounds of reduction stated in the condescendence. I believe it may be the best thing I can do to read it to your Lordships, or the substance of it. It is in these words:—'In obedience to the preceding interlocutor,

'the pursuer condescends and says, first, That at and for several years 'before the dates of the trust-disposition and settlement, the deed of en- 'tail, and deed of alteration under reduction, the deceased James Earl of 'Fife had become blind.' My Lords, I interpose here for a single moment an observation, the effect of which struck me very much in the outset of this matter, and I confess I have never been able to find a very satisfactory answer—that if the Court were of opinion that a blind man is, within the effect and meaning of the Scotch statutes, a man who cannot write, and that therefore the deed of a blind man should be executed in the same way as a deed is required to be executed by a man who cannot write—that in as much as those deeds certainly are not executed in the way in which the statute requires deeds to be executed by a man who cannot write, if the true and clear interpretation of the statutes is, that a blind man cannot write, the moment it appeared in evidence that Lord Fife was a blind man, there must have been an end of the cause. Second, 'That the blindness of the deceased Earl of Fife was occasioned by 'cataracts which had been formed in his eyes, or by some other disorder, 'which cataracts or disorder had been observed so early as the year 1798 'or 1799, or at least long before the dates of the deeds under reduc- 'tion.' The third fact stated in the condescendence—I need not read it at length to your Lordships—is a fact alleged to show to what extent, and to what degree, this blindness went. Then there is this allegation:— 'That the blindness of the said deceased Earl of Fife was such, that it was 'impossible for him to know by means of sight, or by any other suffi- 'cient means, that deeds of any description, which might be read over, or 'might be pretended to be read over to him, were read over according to 'the true words or contents of such deeds.' Fifth, 'That the trust-dis- 'position and settlement, and deed of entail, are each of them of enor- 'mous length'—(this reasoning is unquestionably true)—'are each of 'them of enormous length, consisting of a great number of separate 'sheets.' July 17. 1823.

Then, having stated so much as to the blindness, they go on to state, that the deeds under reduction were not read over to the Earl of Fife in presence of instrumentary witnesses. This reasoning seems to intimate, that if they had been read over by any number of other persons, the want of reading in the presence of the instrumentary witnesses would be fatal to the deeds. Then they further state, 'That the said deeds 'were not read over at one and the same time, but were read over, or 'pretended to be read over, at different times; and in the intervals 'they were laid aside and deposited in a room different from that in 'which they had been read, or pretended to be read: that the Earl 'could neither know that that which was read was truly read, nor that, 'when the readings commenced after the intervals, the same paper or 'deed was brought back to him, in order to have the reading thereof 'continued; but, from his extreme blindness, every reading might have 'been wrong, without his knowing it; and, from the same cause, those 'parts of the papers which had been read might, during the interval,

July 17. 1823. 'have been changed without his knowing it: that it required the Earl 'to be employed for a number of separate days or intervals successively 'in subscribing or attempting to subscribe the said sheets which are 'now stitched together, and compose the trust-disposition and settlement 'and deed of entail under reduction: that when the Earl was employed 'in subscribing or attempting to subscribe the deeds, he had no means 'of knowing the contents of the same.' Then it states, as a tenth fact in the condescendence, the consequence of its being read, and in the manner that is before alleged in the summons; and then, as to the eleventh, 'That in subscribing or attempting to subscribe the said deeds, the Earl 'of Fife had no means of knowing that they consisted of the same sheets 'of paper which had been read over, or had been pretended to be read 'over to him, the deeds or sheets of paper having in the intervals, as 'aforesaid, been laid aside, and the Earl, from being blind, having 'no means of distinguishing whether they were the same writings, or 'other writings of different tenor and contents, that were returned to him 'to be subscribed: that even in the course of the subscriptions, or pre-'tended subscriptions, which occupied many separate days or intervals, 'the deeds, or important sheets thereof, might, in consequence of the 'Earl's blindness, have been changed upon him without his knowledge; 'and that after he supposed that the whole of the subscriptions were 'completed, and that the deeds were fully executed, he could not know 'by means of sight, or by the evidence of his own senses, or by any other 'means than the information of others, that the writings which he had 'subscribed were of the tenor and contents which had been read to him, 'if they were so read: that the blindness of the Earl was such that he 'could not distinguish his own subscription from any other subscription, 'or any other writing, nor could he distinguish whether there was writing 'of any sort upon any paper exhibited to him: that he could not ac-'knowledge his subscription from personal knowledge, in consequence of 'the defect of his sight; and could make no such acknowledgment, but in 'reliance upon what he might have been told by others.'

My Lords, upon so much of the condescendence as I have read, I would observe to your Lordships, that this species of pleading partly consists of argument and reasoning on what may be the consequences in respect of fraud and imposition, if a blind man is to execute a settlement in the manner in which it is contended Lord Fife executed this. Whatever may be the consequences—however open to fraud and to imposition—if the law does allow a man to execute—(I am now putting it without stating any opinion upon it)—but if the law does allow a man to execute in the way in which Lord Fife executed this instrument, that may be an exceedingly good reason for changing the law, in order to prevent blind men from being imposed upon by those means, and in consequence of its being found that all this reasoning is extremely just. But unless the law is so now, that a blind man cannot execute an instrument, because such and such consequences may follow from instruments being executed as this instrument was executed by Lord Fife, it is one thing to alter by le-

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another thing to declare how the matter stands in ent.

llegation has a material connexion with what use, namely, 'that while the Earl was em- pting to subscribe the said deeds or sheets ne of the instrumentary witnesses, was em- business in another room—the charter-room Earl subscribe, nor did he afterwards hear him ac- scription;' and this is certainly a very material allega- ce to the sufficiency of the execution of the instrument, and ce to a question, or two questions perhaps, which arise in the tion of this question, namely, upon whom it lies to prove that n did not see the Earl subscribe, and that he did not afterwards ear him acknowledge his subscription—whether it lies either upon the one party or the other party—whether the result of the trials, and the effect of the verdicts, which I shall have occasion to advert to by and by, prove decisively, as they ought to do, how that fact stands.

Then there is another allegation, 'that after the said deeds, or sheets 'of paper composing the said trust-disposition and settlement and deed 'of entail, were subscribed or pretended to be subscribed by the Earl, 'they were brought to the charter-room by Stewart Souter, one of the 'defenders in this process, who desired Mr. Wilson to fill up the testing 'clause, and sign his name as one of the instrumentary witnesses: that 'it did not occur to either of them at the time that it would be irregular 'for Mr. Wilson to sign as an instrumentary witness, without having seen 'the Earl subscribe the deeds, or having heard him acknowledge the sub- 'scription thereto; and that Mr. Wilson accordingly did, agreeably to the 'request of Mr. Stewart Souter, sign his name as an instrumentary witness 'to the said deeds: that the said Earl was not present when the said Stew- 'art Souter brought the said deeds to the charter-room, nor when he made 'the said request to Mr. Wilson, nor when Mr. Wilson subscribed as 'an instrumentary witness; nor did the said Earl, either at that time or 'afterwards, either directly or indirectly, acknowledge in the hearing of 'Mr. Wilson that he had subscribed the deeds.'

My Lords, to this condescendence an answer was put in by the trustees, in which they state with respect to the blindness—that is, in answer to the first, second, third, and fourth articles of the condescendence which relate to the blindness—'The defenders, without admitting, but denying 'the relevancy thereof, deny the truth of the facts therein stated, and 'aver that, at the dates of the several deeds under reduction, the de- 'ceased James Earl of Fife had not become blind: that his sight was to 'a considerable degree enfeebled by age or otherwise, but that he con- 'tinued to enjoy the powers and use of it to a sufficient degree to enable 'him to read and to write: that he did in fact continue both to read and to 'write long after the dates of the deeds under reduction, and in particular 'that his power and use of sight were such as to enable him legally and ef- 'fectually to execute any deed without the intervention and assistance of

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'public notaries.' Then, in answer to the fifth article, they say, that 'it 'may be sufficient to refer to the deeds themselves produced in process.' In answer to the sixth, seventh, and eighth, they say, 'that the deeds 'under reduction, executed by the Earl on the 7th day of October 1808, 'were read over to him in presence of Alexander F. Williamson, one of 'the instrumentary witnesses, and Stewart Souter, his confidential factor: 'that these deeds were thereafter duly signed by the Earl in presence of 'the said persons: that the deeds so read over to his Lordship were the 'same deeds which he thereafter proceeded to sign: that no fraud was 'practised to substitute one paper, or one sheet of paper, for another; and 'that no such fraud could have been practised in this case with any greater 'facility or chance of success, than in every other case where the aid of con-'fidential men of business in the preparation and execution of deeds is 'employed.' To the ninth article the defenders make answer, 'that the 'said Earl had sufficient means to know and be assured of the contents 'of the deeds which he actually subscribed.' Then they say, that with respect to the fifth, sixth, seventh, eighth, and ninth articles of the condescendence, 'they are to be understood as making these answers with-'out admitting, but, on the other hand, denying the relevancy of them.' To the tenth they say, 'that in subscribing the deeds under reduction, 'the Earl received no assistance, or, at any rate, none of a kind or degree 'to indicate any legal incapacity to execute such deeds without the in-'tervention of public notaries.' In answer to the eleventh and twelfth articles, (which are in substance the same with articles fourth, seventh, and eighth,) 'they refer to the answers already made to those former 'articles; and, in answer to the thirteenth, they deny that the said Earl 'was unable to distinguish his own signature, and acknowledge it as 'such.' With respect to the fourteenth, fifteenth, and sixteenth, they say, 'that George Wilson, one of the instrumentary witnesses, was not 'present when the said Earl subscribed the deeds under reduction, but 'that his subscription was duly acknowledged by the said Earl in his 'presence.' Then they further state, that 'if the condescendence for 'the pursuer appears to be relevant, proof ought to proceed at Edinburgh.'

My Lords, this condescendence and these answers forming the state of the pleadings, so far as I have proceeded, the appellant states in his Case, that with respect to all these grounds of reduction, three only have become the subject of serious consideration. The first, 'That the 'deeds of the Earl could not have been validly executed without the in-'tervention of public notaries.' The second, 'That the subscriptions of 'the Earl had not been adhibited, or duly acknowledged, in the presence 'of the instrumentary witnesses.' And the third, 'That the deeds had 'not been read over in the presence of the witnesses; and that the Earl 'had no certain means of knowing what were the contents of the deeds 'immediately before he signed them.'

My Lords, it appears that it was thought advisable to send these matters to the Jury Court; and in this country, I apprehend, if we had had a case of this sort in our Courts, which have both legal and equitable

jurisdiction, and if it became necessary to ascertain whether this deed was the deed of Lord Fife, a very simple issue would have been directed—namely, to try whether it was the deed of Lord Fife or not. And, on the trial of that issue, every question would have been competent for the parties to have gone into, either by way of establishing the deed, or reducing it—the soundness of mind—capability of sight, and manner of the execution—who were and who were not present at the execution—in short, every circumstance that went to give validity to the deed, or to fix invalidity and nullity on the deed, might have been adverted to in the evidence which might have been produced, either to prove the affirmative of the issue, or to support the negative of the issue,—it being open, of course, to the parties to have excepted to the opinion of the Judge, or to have brought the question of any misdirection before the competent tribunal. It is impossible, on the other hand, for me to say, that there might not be very sufficient reasons for the Court of Session taking the course they did take; because it does appear to me, as far as I am able to judge on looking into this case, that it would have been very difficult—very difficult indeed, considering what is to be found in cases antecedent to this with respect to the doctrines of law, for the first Lord Commissioner sufficiently to know what was the law, with respect to which most of the great Judges who have had occasion to discuss the cases before this have differed so much, that it is difficult now to say what was the law prior to the trial of this case. They seem, therefore, to have taken another course of proceeding, and accordingly the gentleman who calls himself Clerk of the Jury Court first penned the following issues; namely, 'Whether, at the date of the deeds under re-'duction, viz. on the 7th of October 1808, James Earl of Fife deceased 'was totally blind, or was so blind as to be scarcely able to distinguish be-'tween light and darkness; and whether the said Earl was at that time 'incapable of reading any writing, written instrument, or printed book; 'and if at that time he could discover whether a paper was written upon 'or not?' The first question embodies, your Lordships see, three questions, all of which go to the same effect; namely, whether, quoad hoc, (if I may so express myself,) the Earl was to be considered as a blind man; or whether he was to be considered, being blind, the same as an unlettered man?—for the man who cannot write is to be considered pretty much in the same situation as the man who cannot read, except that he may be quite sure that the paper originally before him has not been abstracted from him. 'Secondly, Whether the said deeds were read over to the 'Earl previous to the Earl's name being put thereto, and if so, in pre-'sence of whom; and if read over to the Earl as aforesaid, Whether 'they were all, or any of them, read to him at one and the same time, or 'at different times; and if at different times, whether they were depo-'sited and kept in the room in which they were read, during the whole 'period which elapsed from the commencement of the reading, till the 'name of the said Earl was put to them as aforesaid?'—or where they were deposited. 'Thirdly, Whether the said Earl's name was put to

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July 17. 1823. 'said deeds, or any of them, by having his hand directed to the places of 'signing, or led in making the subscription?'—or if the Earl was assisted, 'and if so, in what manner he was assisted in making his subscription?— 'Fourthly, Whether the said Earl put, or attempted to put, his name to 'the said deeds, or any of them, at one and the same time; or whether 'any period of time intervened; and if there were any interval or 'intervals of time between the said acts, whether the said deeds, and all 'of them, were in the possession or custody of the said Earl, or were in 'the possession or custody of any other person during such intervals of 'time? Fifthly, Whether the Earl put his name to the deeds under 'reduction in the presence of the two instrumentary witnesses, or either 'of them; or did acknowledge his subscription to them, or either of them, 'or at what period he made such acknowledgment?'

My Lords, after this, the amended answers were given in to the condescendence of the Earl of Fife, and those amended answers do require attention. They state, 'that the late James Earl of Fife was a 'man of strong natural understanding, originally intended and bred for 'the Bar'—I suppose this is to prove that he was a man of strong understanding—'before the decease of an elder brother,—of eminent talents 'and capacity through life, for the conduct of ordinary business—of constant activity and vigilance in the management of his own affairs, and 'indefatigable in the direction and execution of the plans he had formed 'for enlarging and improving his estates, and for settling them upon his 'heirs and successors, and adjusting and executing the deeds for that 'purpose, in the mode which he had conceived to be the most expedient 'and desirable.' I hope your Lordships will excuse me the tediousness which belongs to the reading of all these matters; but it is of some importance that it should be understood what are the differences between the form of pleadings in England and Scotland, for more reasons than one, to which I do not wish to refer. 'That at the dates of the deeds 'under reduction, and downwards till near the period of his death, the 'late James Earl of Fife continued to possess, without diminution, all his 'mental faculties, and to exercise, without abatement, all his habits of 'activity and anxious vigilance in the direction and conduct of his affairs: that during some of the latter years of his life, whether from 'age or other causes, his powers of vision were considerably impaired; 'in consequence of which, in the perusal of printed books, as well as of 'manuscript papers, he was usually in the practice of availing himself of 'the aid of some confidential persons whom he retained in his service, 'and upon whose honesty and discretion he placed reliance; but that 'he was by no means blind, as is alleged in the first, second, third, and 'fourth articles of the pursuer's condescendence: that he retained the 'powers of sight in a degree sufficient for all ordinary purposes in the 'conduct of business, as well as for the purposes of society; and in particular that he possessed the powers of reading and of writing, and continued occasionally in the practice both of reading and of writing, whenever it suited his inclination or his objects to do so: that he was in the

'constant practice of executing deeds of all sorts connected with his own affairs, in the same manner as other men possessed of the ordinary powers and faculties required by law for that purpose: that on no occasion had he ever recourse to the attestation of public notaries, instead of the usual modes of personal subscription; and that in no respect whatsoever was the said Earl disqualified for the legal and effectual execution of deeds in this manner: that the deeds under reduction were carefully and deliberately framed and prepared by the Earl, or by his ordinary agents under his Lordship's immediate orders and superintendence: that in all their clauses and provisions, these deeds had been minutely and anxiously considered by his Lordship, and that they contained and expressed his enixa voluntas in the settlement of his affairs at the date of their execution: that the deeds so prepared, and finally adjusted, were read over to the Earl in the presence of one of the instrumentary witnesses, and Souter, his confidential factor: that these deeds were thereafter duly signed by the said Earl in presence of the said persons: that the deeds so read over to his Lordship were the same deeds which he thereafter proceeded to sign: that as it has not been alleged that any fraud was practised to substitute one paper or one sheet of paper for another, so no such fraud could have been practised in this case with any greater facility of success, than in every other case where the aid of confidential men of business in the preparation and execution of deeds is employed: that the Earl had sufficient means to know and be assured of the contents of the deeds which he actually subscribed: that, in subscribing the deeds under reduction, the Earl received no assistance, but wrote the whole subscriptions with his own unassisted hand: that the Earl was able to distinguish his own signature, and to acknowledge it as such: that George Wilson, one of the instrumentary witnesses, was not present when the Earl subscribed the deeds under reduction, but that the subscription was duly acknowledged by the Earl in his presence.' July 17. 1823.

My Lords, I believe I am not inaccurate, but if I am, I shall be able to correct that inaccuracy presently; but I believe that Wilson was not present when the Earl subscribed the deeds; and, with respect to the acknowledgment of the subscription, the effect of the verdict is, that it is not proven. What that means in such a case, it may perhaps be of some importance to have very well understood.

My Lords, this condescendence and these answers consist partly of allegation of fact, and partly of allegation of reasoning; partly of allegation of reasoning as to what may be the consequences of acceding to the doctrines insisted upon by the pursuer with respect to various deeds and instruments executed by Lord Fife, and various deeds and instruments executed by other persons under similar circumstances. In rightly considering pleadings of this nature, difficulties sometimes arise to a person whose views of pleading are so exceedingly narrow as those of the person who has now the honour to address your Lordships.

There were additions made to this condescendence of the Earl of Fife, in which he states that these answers are irregular in point of form, and 'are calculated for no other purpose than to throw the cause into confu-

July 17. 1823. 'sion;' and he represents them as otherwise open to a great variety of objections which, in our forms of pleadings, we should have thought extremely clear.

My Lords, there was afterwards a minute given in on behalf of the Earl of Fife, under the leave of the Court, and he says 'that the granter 'of the deeds was, at their date, in such a state of blindness as to ren- 'der him legally incapable of executing them; and, in the second place, 'that the instrumentary witnesses did not see him subscribe, or hear 'him acknowledge his subscription.' This was bringing the thing to a point; because, if he was blind, and therefore incapable, by his own signature, of executing an instrument—if that be the construction of the statute, which I shall have to read to your Lordships by and by, whether they did see him write, or did hear him acknowledge his subscription, would be an inquiry not very useful, if the fact were, that being blind, he was therefore incapable of executing them. If, then, he was incapable of executing them by subscription, then it becomes a very important question whether the instrumentary witnesses saw him subscribe, or heard him acknowledge his subscription; and it becomes likewise a very material question, upon whom it is that the burden of proof is cast by the law—upon which party it is? The allegation is, 'that the instrumentary 'witnesses did not see him subscribe, or hear him acknowledge his sub- 'scription.'

My Lords, after the pleadings had been closed on both sides, the Court were pleased to direct that there should be seven issues; and those seven issues were in the following form:—'1st, Whether, at the date of the 'deeds under reduction, viz. on the 7th October 1808, James Earl of 'Fife deceased was totally blind, or was so blind as to be scarcely able 'to distinguish between light and darkness? and whether the said Earl 'was at that time incapable of reading any writing, written instrument, 'or printed book; and if at that time he could discover whether a paper 'was written upon or not? 2d, Whether the said deeds were read over 'to the said Earl, previous to the said Earl's name being put thereto; 'and if so, in presence of whom; and if read over to the said Earl as 'aforesaid, whether they were all or any of them read to him at one and 'the same time, or at different times; and if at different times, whether 'they were deposited and kept in the room in which they were read, 'during the whole period which elapsed from the commencement of the 'reading, till the name of the said Earl was put to them as aforesaid, or 'where they were deposited? 3dly, Whether the Earl's name was put 'to the deeds, or any of them, by having his hand directed to the places 'of signing, or led in making the subscription? 4thly, Whether the Earl 'put, or attempted to put, his name to the deeds, or any of them, at one 'and the same time, or whether any period of time intervened; and if 'there were any interval or intervals of time between the acts, whether 'the deeds and all of them were in the possession or custody of the Earl, 'or were in the possession or custody of any other person during such 'intervals of time? 5thly, Whether the Earl put his name to the deeds

'under reduction, in presence of the two instrumentary witnesses, or 'either of them? or did acknowledge his subscription to them or either 'of them? or at what period he made such acknowledgment? 6thly, 'Whether the Earl was, until the dates of the deeds under reduction, or 'at a later period, a man remarkably attentive to, and in the use of trans-'acting every sort of business connected with his estates, and in the practice 'and habit of executing, and in fact did execute, deeds of all sorts con-'nected with his own affairs, by subscribing the same with his own 'hand, and without the intervention of notaries? 7thly, Whether the 'said Earl took means to ascertain that the deeds under reduction, alleged 'to have been signed by him, were conform to the scrolls of deeds pre-'pared by his agents under his special direction, and what were the means 'he took to ascertain the same?' July 17. 1823.

These issues were directed to be sent to the Jury Court, and the Jury Court returned the following verdict:—'That James Earl of Fife, at the 'date of the deeds under reduction, viz. on the 7th of October 1808, was 'not totally blind'—that is, in October 1808—there is no mention of November 1808; though, to be sure, it is hardly possible that his power of seeing could have increased during that time—'was not totally blind, 'though he could scarcely distinguish between light and darkness: that 'the Earl was at that time incapable of reading any writing, written in-'strument, or printed book. He could not at that time discover whether 'a paper was written upon or not.' So that, whether he was blind or not, they do not find. 'As to the second issue, that the deeds were 'read over previous to the Earl's name being put thereto in presence of 'Souter and Williamson, or one or other of them;' but the verdict does not find which. Then they go on to state, that 'it is not proven whether they 'were all read to him at one and the same time, or at different times; 'but one was read at the time that the deeds were signed.' Your Lordships observe, that the finding is, that it is not proven whether they were read at one and the same time. Perhaps I do not very well understand the practice in the Courts in Scotland in these matters; but I do understand that it is a very familiar thing in the administration of the Criminal Courts of Scotland, on the trial, whether a person is guilty or not guilty, for the Jury not to say guilty or not guilty in many cases, but to say 'not 'proven—that is to say, that they are satisfied of neither the man's innocence nor his guilt—that they cannot find him guilty, and do not choose to find him not guilty; but they find that his guilt is not proven. Now, according to our law, what is not proved does not exist. Whether this same sort of practice obtains in matters of civil question, or whether it was ever meant to obtain in the finding of Juries in civil cases under the new institution of the Jury Court, is a point that is certainly worthy of consideration; and it seems to be a very material question when you are to ask yourselves upon whom does the onus probandi lie? Because, if the onus probandi lies upon me, and if I can get no further than 'not 'proven' that the thing was so and so, I have not carried the onus probandi on my shoulders with perfectly good effect. This, however, is a

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matter which must be made the subject of much more observation. 'That 'it is not proven whether they were deposited and kept in the room in 'which they were read, during the whole period which elapsed from the 'commencement of the reading, till the name of the Earl was put to 'them as aforesaid, or where they were deposited.' As to the third issue, 'That the said Earl put his name to the deeds, by feeling for the 'finger or fingers of another person on the spot for signature, and was no 'otherwise assisted than as above described.' As to the fourth issue, 'That 'the said Earl put his name to the said deeds at one and the same time.' As to the fifth issue, 'That the Earl put his name to the deeds under re-'duction in presence of one instrumentary witness, viz. Alexander Fer-'teith Williamson; but that it is not proven that the said Earl did ac-'knowledge his subscription to George Williamson, the other instru-'mentary witness,' which never has been altered to this moment. As to the sixth issue, 'Proven in the affirmative.' As to the seventh issue, 'That the only means which the Earl took to ascertain that the deeds 'under reduction were conform to the scrolls of deeds prepared by his 'agents under his special directions, were his having heard the deeds 'read over to him.'

Now I do not find in the subsequent proceedings that this finding that the deeds had been read over to him, as a means of ascertaining that the deeds under reduction were conform to the scrolls of deeds prepared by his agents under his special directions, has been displaced, except by what took place upon the second trial with respect to the second issue. I think it then becomes a question, Whether this is still to stand as part of the finding of one Jury, displaced or not displaced by a contrary finding of another Jury,—both findings being before the Court, whether they are to be considered the one as overruling the other, or to be considered as two findings inconsistent with each other? They are two findings, out of which you cannot find satisfactorily what is the fact to which they relate.

My Lords, after this a motion was made for a new trial, upon the ground (if I recollect this part of the case rightly) that some evidence had not been given which ought to have been given. It is not material, but the Court directed, in consequence of that application, that there should be a new trial upon the second issue; and when they came to consider how that new trial was to take place, the pursuer, the Earl of Fife, insisted that the trustees should begin and be required to prove affirmatively. The trustees, on the other hand, insisted, not that they were to prove affirmatively, but that the matter was to go on in the shape of the negative of the issues which had been directed. The Court did not think fit to alter the terms of the issues. It is alleged on the one side—certainly not admitted on the other—that this is some evidence of the understanding of those who advised the Earl of Fife, that more of the onus probandi lay upon him than had been considered. That, however, I shall take occasion to refer to hereafter.

My Lords, upon this trial a question arose with respect to the direc-

tions of the learned First Lord Commissioner of the Jury Court as to the effect of some evidence that was offered; and a bill of exceptions was tendered, the consideration of which bill of exceptions afterwards came before the Division of the Court of Session; the opinion of which was, that matters were right; but whether they were right or wrong, still it is immaterial, because there is no appeal from the bill of exceptions to us; and there being no appeal from the bill of exceptions to us, we cannot enter into the question, whether the Judge against whose direction such bill of exceptions was tendered was right or wrong. July 17. 1823.

The finding in consequence of the second trial was this:—'That it has 'not been proven that the deeds under reduction were read over to the 'Earl of Fife, previous to the Earl's name being put thereto.' So that we have, upon the finding of the first Jury upon the seventh issue, 'that 'the only means which the Earl took to ascertain that the deeds under 'reduction were conform to the scrolls of deeds prepared by his agents 'under his special directions, were his having heard the said deeds read 'over to him;' and by the second Jury we have the finding in the words I have just mentioned to your Lordships, namely, not an allegation in such a form as it would be in our law. Whether the effect is or is not different will remain to be considered, arising out of the particular circumstances. The finding in the one case that I have read, in respect of the second issue, is positive that he had heard the deeds read over to him; in the other it is, that it had not been proven that the deeds under reduction were read over to the Earl, previous to his name being put thereto.

My Lords, after this verdict the matter came on before the Lord Ordinary, my Lord Pitmilly, as I take it he was Ordinary again; and as he was pleased to state this upon the subject, it is material that your Lordships should attend to this interlocutor. That, I observe, was on the 24th January 1818. In the fourth interlocutor his Lordship says, that 'having considered the mutual memorials for the parties in this cause, with 'the whole process, finds that a person about to execute a deed of importance'—(your Lordships know that under the statute there is a distinction between an ordinary deed and a deed of importance,)—'who, at 'the time of the execution of it, is, in the words of the verdict of this 'case, not totally blind, though he can scarcely distinguish between light 'and darkness, and is incapable of reading any writing, written instrument or printed book, and cannot discover whether a paper was written 'upon or not, and who can only put his name to the deed by feeling for 'the finger or fingers of another person on the spot for signature, is not 'only entitled in law, but ought to execute the deeds by means of notaries and witnesses, in terms of the act 1579, c. 80; but finds that 'there is no sufficient authority in the law of Scotland for concluding 'that a deed signed by a person in the situation above described, in presence of two witnesses, in the usual manner, is null, or can make no 'faith, provided the deed be proved to have been distinctly read over to 'the granter in presence of the witnesses, immediately before the sub-

July 17. 1823. ' scription is made.' By the words ' the witnesses' there, I understand his Lordship to mean the witnesses making the attestation; ' in order to ' afford that degree of evidence which the law requires, and which is ' plainly necessary to show that the deed given to the granter to subscribe ' is truly in all its parts the deed which he intended to execute.'

My Lords, so far as I have read the interlocutor of this very learned Judge, your Lordships observe that he states, that a person having this degree of blindness which made him unable to see how to write, is not only entitled in law, but ought to execute the deeds by means of notaries and witnesses, in terms of the act 1579, c. 80; and therefore one question which your Lordships will have to decide, and which you must decide, is, Whether a person in the situation and circumstances in which my Lord Fife stood in the exercise of his faculties, is a person alluded to at all by that statute of 1579? ' But finds that there is no sufficient autho- ' rity in the law of Scotland for concluding that a deed signed by a per- ' son in the situation above described, in presence of two witnesses, in ' the usual manner, is null, or can make no faith, provided the deed be ' proved to have been distinctly read over to the granter, in presence of ' the witnesses, immediately before the subscription is made, in order to ' afford that degree of evidence which the law requires, and which is ' plainly necessary to show that the deed given to the granter to subscribe ' is truly in all its parts the deed which he intended to execute.' I here also understand his Lordship, the Lord Ordinary, to be still proceeding upon the notion that this statute of 1579 does embrace the case of a person in my Lord Fife's circumstances. ' That the fact of the deed ' subscribed by a blind man having been read over to him in presence of ' the witnesses before subscription, is not a fact which is to be presumed ' in law from the attestation of the witnesses to the fact of his having ' subscribed the deeds'—that is, that the mere fact of his having subscribed the deeds is not to be taken as a ground of presumption that they had been read over to him in the presence of witnesses; ' but that the ' fact of the reading over must be proved by the user of the deed when it ' is disputed: Finds that it has been established by the verdict of the ' Jury on the second trial, that it has not been proven that the deeds ' under reduction were read over to the said Earl of Fife, previous to the ' said Earl's name being put thereto; and finds that the deeds are on ' this ground reducible.' Now this last finding appears to me perfectly consistent; because, if my Lord Pitmilly was of opinion, and if that opinion was right—that the burden of proving that the deed was read over lay upon the person who was the user of the deed—and if he was right in stating that the fact of the reading over was not to be presumed in law from the attestation of witnesses of the fact of his having subscribed the deed—(in whatever sense you take the words ' has not been proven')—if he was right in saying, that in as much as that had not been proven by the user of the deed, the consequence was, that the deeds were upon that ground reducible; but what his opinion would have been, if in point of law he had thought that the burden was upon those who quarrelled the

deed, and sought to reduce it, to prove that it had not been read over;— July 17. 1813.
what his opinion would have been, either as the law to be deduced from the facts of the case, or what his opinion would have been upon the construction of the words 'that it has not been proven,' appears to me to be that which we cannot at all infer from any thing which appears upon this interlocutor.

My Lords, the Lord Ordinary then goes on to state this note:—'It is 'proper for the Lord Ordinary to explain in a note why he has not taken 'notice in this interlocutor of the separate objection to the deeds under 'reduction, on which a great deal of argument is bestowed in the memo-'rial, founded on the allegation that the late Earl of Fife did not acknow-'ledge his subscription to George Wilson, the instrumentary witness who 'was not present when the subscription was adhibited. The Lord Or-'dinary's opinion on this point is, that the presumption of the law is, in 'this particular case, in favour of the deeds; but as it has been established 'by the verdict that the granter of the deeds was incapable of reading 'any writing, and could not discover whether paper was written upon or 'not,—and as it has also been established by the verdict that the Earl 'put his name to the deeds in presence of one only of the instrumentary 'witnesses, so that the acknowledgment of his subscription to the other 'instrumentary witness, which is presumed to have been made, must 'have been made by a person who could not see the subscriptions (up-'wards of 160 in number) intended to be acknowledged by him, the 'Lord Ordinary thinks that the manner in which the subscriptions are 'attested, gives rise to an important objection against the validity of the 'deeds. If the verdict had established that the deeds remained in the 'actual personal possession of the granter till after the time when the 'acknowledgment of the subscriptions may have been made, the objection 'alluded to would have been the less important. If, again, the verdict had 'borne that the deeds were taken out of Lord Fife's hands immediately 'after the subscriptions were written, and before his Lordship had an op-'portunity of meeting with Mr. Wilson, and of acknowledging his sub-'scription to him, the objection to the attestation of the subscriptions 'would have appeared more formidable, if not decisive. In referring to 'the case of Coutts against Straiton, Lord Bankton makes an important 'observation in a passage not noticed in the memorials.'

My Lords, there was a representation against this interlocutor, and then the Lord Ordinary, 'in respect of the great importance of this case 'in point of law, and that although the opinion expressed by the Lord 'Ordinary in the interlocutor represented against remains unaltered, yet 'it will be more convenient for the Court, and more for the advantage of 'the parties, that the whole cause should be stated in one paper on each 'side, than that mutual petitions should be given in, which might be fol-'lowed by two sets of answers, makes avizandum with the cause to the 'Lords of the Second Division; and ordains the parties to prepare, print, 'and box informations.' Then he pronounced an interlocutor which related only to the preparing, printing, and boxing informations.

July 17. 1823. My Lords, the matter came before the Court afterwards, and they were of opinion, upon the whole—some for one reason, and some for another reason—that the deeds should be reduced. They give different reasons for the reduction of the deeds, and I think they give reasons which it is extremely difficult to reconcile to each other; and, upon the whole, I believe I may venture to represent them very much thus to your Lordships: One doctrine which is sought to be maintained is, that a blind man is a person who, according to the acts of the Scotish Parliament, cannot subscribe by testamentary witnesses; and if that doctrine be true, there is an end of the question. They say that he ought to have executed by notaries and witnesses; and if I understand the opinions that have been laid before your Lordships in what are called 'Notes of the 'Judges' Opinions,' I think I may represent to your Lordships, that with respect to the executing by subscription, Lord Craigie and the Lord Justice-Clerk were of opinion that he could not execute by subscription: that Lord Glenlee, and Lord Robertson, and Lord Bannatyne were of opinion that he could execute by subscription: that with respect to reading, all of them, I think, held that reading was not a statutory solemnity. My Lords, I see that a distinction is taken in the book of a very learned writer—I mean Mr. Bell—between a statutory solemnity and a consuetudinary solemnity, which being interpreted, I should state myself thus:—That a consuetudinary solemnity is required by common law, and is not required by the statute law; but still that which is required by the common law must be as much attended to as if it was required by statute; but I think they are all of opinion, that though it may be a solemnity, it is not a statutory solemnity. Then with respect to the necessity of proving reading where the party is proved to be blind, Lord Glenlee, Lord Robertson, and Lord Bannatyne are of opinion that when the party is proved to be blind, the reading must be proved; and the Lord Justice-Clerk seems to be of opinion also, that if he could subscribe,—that is to say, if the statute does not consider a blind man as a man who cannot write, which it is his opinion that it does,—but if the statute does not consider a blind man as a man who cannot write, and if therefore he could write, the reading must be proved; but he is not very decided, I think, in the opinion which he gives, whether the reading must be proved or not. Lord Craigie is clearly of opinion, that if he could subscribe, according to the true intent and meaning of the statutes, it was not necessary to prove that they were read to him; and with respect to another question, whether it was necessary that they should be read to him at the time of subscribing, there is great difference of opinion among the Judges. I have not collected the opinion of each exactly as to that point; but there is great difference of opinion as to the fact, whether they must or must not be read at the time of subscribing.

My Lords, with respect to the question upon whom the onus probandi is of reading in case of a blind man, Lord Glenlee, Lord Robertson, and, as it seems to me, Lord Justice-Clerk, are of opinion that it is upon the defender. Lord Craigie is of opinion that if the party

could subscribe, it must be upon the pursuer; and Lord Bannatyne makes an observation which applies to the different findings by the second Jury and the first Jury, as to the reading over, which are inconsistent with each other. He says it is fixed by the verdict, that he took no other means of ascertaining that the deeds under reduction were conform to the scrolls of deeds prepared by his agents under his special directions, than his having heard them read over to him; but he does not consider this as satisfactory evidence of that fact, and there he leaves it. July 17. 1823.

My Lords, with respect to the question upon whom the proof of acknowledgment lies, the pursuer, as I collect the opinions, is called upon to prove the negative by Lord Glenlee, Lord Bannatyne, and Lord Craigie, if the party could subscribe. The Lord Justice-Clerk and Lord Robertson state considerable doubts upon the subject. However, it does appear, that taking all these different opinions together, in order to determine whether, on all the grounds taken together, it could be determined that those were or were not the deeds of the late Lord Fife, some of the Judges so holding for one reason, some so holding for another reason, they find, as I understand the case—(if I am wrong in that, I shall be glad now to be set right, and beg I may be set right)—that the reasons of reduction of the trust-disposition and deed of entail—that is, of the deeds of October —are good; but the interlocutors have neither reduced nor supported the deed of alteration of November. And with respect to the deed of alteration of November, either the matter has been altogether overlooked, or it is to be considered as a matter that is sent back to the Lord Ordinary, in order there to be dealt with as there it ought to be. Perhaps, my Lords, it was the intention to send it back to the Lord Ordinary, to be there dealt with as it ought to be dealt with; but here the observation has occurred to me from the beginning of this cause, and which I have never been able to remove from my mind, nor am I now able to remove it from my mind, namely, that the summons here, being a summons of reduction with respect to all the instruments, it should seem to persons whose minds are influenced by the considerations which affect the mind of an English lawyer, that if the deed of alteration of November 1808 was a deed properly executed by Lord Fife, in as much as that is a deed of alteration of the instruments of October 1808, it seems to me a most extraordinary thing that it could be said—(I mean, supposing the statutes themselves, as to the modes of execution, do not sweep away the whole) —but it seems to me a very extraordinary thing that that deed of alteration, which I cannot see was laid before the Jury at all, should not itself be taken to be some evidence that the party who was altering the deed knew something about the contents of the deed that he altered. I should have thought myself it would not have been an improper mode of proceeding to have had an issue directed upon that deed, as well as the other deeds, and to have had it considered what was the effect of that deed. I mean, if the question with respect to the statutes left the Court open to consider what evidence it might afford under the seventh issue, that he had understood the contents of the deeds he executed in October, that

July 17. 1823. being put as a question, and the Jury being left to determine that he did thoroughly or not thoroughly understand the deeds which he had so altered—that, I say, certainly does raise a very considerable doubt in my mind at this moment.

Your Lordships will see that there are a great many questions you have now to decide. One is, whether this matter has been satisfactorily tried? Another is, supposing it not to have been satisfactorily tried, what course of proceeding is open to you, regard being had to the fact that you are a Court of Appeal, and regard being had to the effect of the two acts of Parliament with respect to the trial by Jury? If your Lordships could be satisfied that it was a wholesome way of proceeding—(I am not now examining whether it is or not)—but if you could be satisfied that it was a wholesome way of proceeding to direct another trial upon the general issue whether those deeds, or each or any of them, were the deeds of Lord Fife? I am afraid that if you sent it down in that shape, the consequence unquestionably would be, that, with all the differences of opinion which are recorded in the notes with respect to this case, and which, I think, your Lordships cannot but trace in some of the antecedent cases I shall have occasion to observe upon presently, in all probability the consequence would be, that the issue being so directed, some such directions would be given upon the trial of that issue as would lead to bills of exceptions, and those bills of exceptions would get to the Court of Session upon those matters which would be matter of such differences of opinion; and that difference of opinion would bring the cause back again, in all human probability, to this House, in order to have those doctrines of law which would be to be agitated, first, in the Jury Court; secondly, by the bill of exceptions; and, thirdly, reconsidered here with as little of influence from the prior decision as they influence the consideration of the case now before your Lordships: Therefore, first of all, if it is right that you should—(with reference to which I will say nothing to-day)—if it be right you should have this more satisfactorily tried, the first question will be, whether you can take that course consistently with the two acts of Parliament? and, secondly, whether, if you can take that course consistently with the two acts of Parliament, it would be right for you, by certain findings, prefacing the direction of such an issue, to state what are the opinions of this House with respect to many of those doctrines which have been discussed in the Courts below; and that is a consideration which also must be attended to in another point of view, namely, that if it is wholesome and competent for you so to act, you will have to consider how far the matters which would be the subject-matter of other findings have, or have not, already met with discussions in the Court below. All these are certainly open to very serious questions.

My Lords, upon the question itself, whether a blind man can execute by subscription—if it were thought fit to have what the Scotish Courts call a comparatio literarum—if the writing be of consequence, it might be of importance to have your Lordships' roll of Parliament sent down, because the signature of Lord Fife, almost immediately before this, is al-

most a fac-simile of the signatures to be found to these deeds; but that I throw out of this question. July 17. 1823.

My Lords, what is the law with respect to the execution of an instrument by a blind man? If the Scotish statutes do not in terms decide that, I think you can hardly enter into that question satisfactorily, without looking a little to what is the law in other countries; for though the law of England is not the law of Scotland—though the Roman law is not the law either of England or Scotland with respect to this point, yet the doctrines of law are to be found in the law of England, and in the Roman law, so far as they are doctrines founded on good sense. When you are considering what is the law of Scotland, if you cannot find it in the consuetudinary law before the statutes, or cannot find the law as dictated by the statutes, I say that then the law of other countries is to be looked at with reference to that subject. It is astonishing how very little is to be found in the law of Scotland upon the subject;—it is astonishing how very little is to be found in the law of England upon the subject;—and it is quite clear, that neither by the law of England, nor by the law of Scotland, can it be contended that all the cautions which were required by the Roman law have ever been required.

With respect to the law of England, you will find that in the law relating to real estate, or the law relating to personal estate, very little is to be found in our books. With respect to the law relating to real estate, Blackstone appears to me to have drawn this as a conclusion from what he finds upon this subject:—'I proceed now to the fifth requisite for 'making a good deed—the reading of it. This is necessary wherever 'any of the parties desire it; and if it be not done on his request, the 'deed is void as to him. If he can, he should read it himself; if he be 'blind or illiterate, another must read it to him. If it be read falsely, it 'will be void, at least for so much as is misrecited, unless it be agreed 'by collusion that the deed shall be read false, on purpose to make it 'void; for in such case it shall bind the fraudulent party.' My Lords, the material expressions here are—'This is necessary wherever any of 'the parties desires it; and if it be not done on his request, the deed is 'void as to him. If he can, he should read it himself; if he be blind or 'illiterate, another must read it to him.' Now, your Lordships will permit me to observe upon this passage, that it certainly is not a passage that intimates any necessity for those persons reading it to him who are the subscribing witnesses. It may be a caution, and an extremely wise caution, to do so, but that is not required by the doctrine laid down in this passage; nor am I aware, as an English lawyer, that if it could be proved by other evidence that he perfectly knew the contents of the instrument, it would be necessary to prove the precise act of reading in the presence of the subscribing witnesses, because I apprehend that the act of reading is only evidence that he understood it; and though it may be extremely difficult to find other evidence so satisfactory as the act of reading, yet if there was other evidence offered to a Jury satisfactory upon that head, I apprehend they would be perfectly well justified in finding that that was

July 17. 1823. his act; and there may be many reasons why a blind man may choose to execute a deed or a will, without having it read in the presence of the subscribing witnesses. Your Lordships, however, will find some doctrine upon this in Lord Coke's second report, and the eleventh report, which is material to be attended to. In the second report I find this:—'In this 'case three points were resolved: 1st, That if a man not lettered be 'bound to make a deed, he is not bound to seal and deliver any writing 'tendered to him, unless somebody be present who can read the deed to 'him, if he requires the writing to be read to him; and if the deed be in 'Latin, French, or other language, (which the party who is to execute 'the writing doth not understand,) in such case, if the party demands that 'one should read and interpret the writing to him, and none be present 'that can read and expound the tenor of the same in that language that 'the party who is to deliver the deed understands, there the party may 'well refuse to deliver it: so it is, although the man can read; yet if the 'deed be indicted in Latin, French, or other such language as the party 'who is to execute cannot understand, if he demands that the writing be 'read or expounded to him in such language as he may understand it, 'and nobody be there to do it, the party may refuse to deliver it.' There is then a point put, which I confess appears to me to be pretty hard doctrine. A man had read a deed, and required time for counsel to inform him whether the deed was right; but a judgment is stated in which that liberty and that opportunity was refused as that which he was not entitled to.

There is another passage to be found in Piggot's case in Coke's eleventh report, in which Thorpe, Justice, says, (and this is a very material passage,) 'Every deed ought to have writing, sealing, and delivery; and when 'any thing shall pass from them who had not understanding but by hear-'ing only, it ought to be read also; and it is true that he who is not let-'tered is reputed in law as he who cannot see, but hear only, and all his 'understanding is by his hearing; and so a man who is lettered and can-'not see is, as to this purpose, taken in law as a man not lettered: and 'therefore if a man is lettered and is blind, if the deed is read to him in 'other manner, he shall avoid the deed, because all his understanding in 'such case is by his hearing, as it was resolved in the case of one John 'Shuter.' Your Lordships will observe, that Thorpe, Justice, does go so far as to state, that when any thing shall pass from a man who understood by hearing only, it ought to be read also. What is to be the evidence that it was read, certainly is quite another matter of consideration.

My Lords, there is another case which is material in the law of England, which I see they had in Scotland, and in which perhaps it is not much more easy to reconcile what is said by the different Judges in England, than it is to reconcile all that has been said by the different Judges in Scotland on this point, and that is a case to be found in the second volume of Bosanquet and Puller. There 'the testator being 'eighty years of age, and blind, in July 1801 applied to a friend of the 'name of Davis to make his will, and dictated every word himself, making

'a devise in favour of the lessor of the plaintiff, who was his stepdaughter, July 17. 1823.
'and lived with him, to the disadvantage of the defendant, his son. After
'the will was written by Davis, the testator went into the room where
'the lessor of the plaintiff, with other persons, was, and desired Davis to
'read it over, and then said, 'Now, Nancy, are you satisfied?' Davis
'then took the paper away with him, to get it copied; and when he
'brought it back fairly copied, two months afterwards, the testator made
'an alteration in it.' (You see it was brought back two months afterwards, and the testator made an alteration in it, which alteration was considered by the Court here as a very material circumstance, though that is taken no notice of by the Court below.) 'The testator made an alter-
'ation in it, and perfectly understood what he was doing. After the
'alteration made in the will, it was executed by the testator in the pre-
'sence of Davis and the three attesting witnesses named by the testator.
'The will was not read over in the presence of the attesting witnesses
'before it was signed by the testator, but was merely placed before him
'in their presence, and executed.' Now, in passing, my Lords, let me observe, the will was open to every objection almost in point of reasoning, to which either the will in this case may be exposed, or to which the wills in former cases, (in which the Judges held the language I shall have occasion to state to your Lordships by and by,) antecedent to that, were open; because the will having been copied from another paper, was not read over in the presence of the subscribing witnesses, which has been thought by many of these Judges to be necessary. It might have been altered over and over again; and he did not know whether it had or not, by reading it at the time of the execution. If he knew it at all, it must be by other evidence; and therefore this case, in which it was held that the will was good, seems to me to be an affirmance that, in the law of England, other evidence than reading at the time may be received, to prove that the testator did understand the instrument he executed. It is stated in the report, that it was not read at the time of the execution; and the Lord Chief Baron on the trial having held that this was sufficient proof, Mr. Justice Heath says this—(and let me not name that learned Judge, without stating that I had once the honour of sitting with him in the Court of Common Pleas fifteen months, and I cannot do justice to my own ideas of his great professional knowledge—I was quite surprised at it:) 'The statute of frauds only requires that the testator shall execute
'the will in the presence of the attesting witnesses; and in ordinary cases,
'when that is done, all is done that is necessary to be done.' My Lords, this passage is material to be observed, because your Lordships will have presently (attending to the Scotch statutes) to see whether they require any thing more than the attestation of the subscription. 'It is true that
'frauds are sometimes practised, and it was with a view of preventing
'these frauds that the statute directed the will to be signed in the pre-
'sence of the attesting witnesses. In the case of a blind man, stronger
'evidence would be required than the mere attestation of signature.' Your Lordships will see by and by what the other Judges say; 'but

July 17. 1823. 'in this case there was that stronger evidence which the peculiarity of 'the case seems to call for.' The 'stronger evidence' to which the learned Judge alludes, is the alteration that he made in the will, and the circumstance of his question to his stepdaughter, whether she was satisfied when it was read over? 'In the course of the argument, sufficient 'attention has not been paid to the distinction between what shall be 'deemed a literal compliance with the provisions of the statute, and what 'sufficient proof to rebut any imputation of fraud. The question of 'fraud is for the Jury entirely, and here they found the will to be a valid 'will. The Lord Chief Baron was of that opinion at the trial, and I 'agree with him. Great inconvenience would arise from any rule re-'quiring the wills of blind men to be read over in the presence of the 'attesting witnesses, nor would the mere reading to them be a certain 'guard against fraud, since it might be read falsely. No authorities from 'the civil law have any force or application in this case.'

Mr. Justice Rooke holds the will to be good; and he says, 'If a fair 'ground for presuming fraud were laid by the evidence, the circumstance 'of the testator being blind would most materially strengthen that pre-'sumption.' Mr. Justice Chambré says, 'This question must be decided 'by the provisions of the statute of frauds. Now it does not appear that 'the Legislature, when they passed that statute, had in their contem-'plation executions of wills by blind men. Testators are generally very 'averse to have their intended disposition of property made known in 'their families before their deaths; and blind men, who stand so much 'in need of attention from their relatives, would probably be peculiarly 'averse to it. The remainder of their lives might, in consequence of such 'disclosures, be rendered completely uncomfortable; at all events they 'might produce great discord in families. There cannot be a doubt, that 'if this were an instrument by deed, or any other written engagement, 'the mere signature of the party, though blind, would be deemed a 'sufficient execution; and the only thing to be proved would be, that 'the blind man was imposed upon.' He does not state upon whom that proof lay; but he observes, 'In this case that fact is completely estab-'lished by an unimpeached witness, who took instructions from the 'mouth of the blind man himself, and wrote them down.' He holds, therefore, that the mere signature of the party, though blind, would be deemed a sufficient execution, and the only thing to be proved would be, that he was imposed upon.

My Lords, with respect to the doctrines of our Courts, it has invariably been held that a blind man cannot execute. Swinburne has held the contrary; but his notion goes a long way towards establishing that the instrument must be read over. Whether he means by that, that there must be direct proof of the reading, or whether he means satisfactory proof that the testator knew the contents, which he might know by its having been read over at a time when there might be no witness to prove the fact, seems to be left open to a doubt from which I have taken some pains in vain to relieve myself.

My Lords, in this state of things, your Lordships have now to look back to the various cases which were decided before the present case was brought into the Court of Session. It will be impossible for me to go through all those cases in the course of this morning, nor am I equal to the execution of it. One case, however, I will dispose of at this moment, which I can dispose of, not merely from reading the papers, but my recollection of it—I mean Lothian's case. I had the honour to be counsel in that case; and unless my memory deceives me very much, it is the very case which has so often led me to conceive that it was not quite a good rule in this House to affirm a judgment, without giving the reasons for the affirmance. In that case there were several things relied on to beat down the validity of the instrument. There were points such as there are in the present case; and in the case signed by the counsel there were what may be represented as admissions of very great importance in support of the judgment which has been pronounced—that is, admissions by counsel who signed the case. When it was argued at the Bar, it was argued (unless my memory deceive me) at very great length; but I am perfectly convinced that case was decided—I think it was in 1794, when Lord Loughborough was Chancellor, (but my Lord Thurlow attending,)—it was decided upon satisfactory proof—that is, proof which they thought satisfactory. I believe I argued at the Bar that there was no imposition at all, and I was extremely dissatisfied at their being satisfied; but they thought there was satisfactory proof that Lothian had been imposed upon; and, on looking at the case, it is very difficult to say that there is not some proof that he had been imposed upon. I am confident the case went upon that ground, and was not decided upon the doctrines of law that are involved in the present case. July 17. 1823.

My Lords, if you look back to the antecedent cases which are stated in the publication of Mr. Bell, a very eminent writer on the Scotch law, we have, according to him, not only the opinions of counsel on some of the points, but the doctrines of the Judges in some of those antecedent cases; and I think I cannot speak without attending to the fact, that I ought never to speak of the Scotch Judges but with respect, when I say, that if you look to the different judgments that are given, you will find there are doctrines laid down by those Judges which they could not themselves maintain afterwards—that there are doctrines which they afterwards disclaimed—and that there is one of the questions which will fall to be decided in this case, which they did not decide.

My Lords, the questions that it will be my duty to trouble your Lordships with on Friday will be, Whether Lord Fife was a man (as Lord Pitmilly says) that was entitled and ought to execute by notaries and witnesses? or whether, on the other hand, because he was blind, he was a person who, within the intent and meaning of these statutes, could not write? That, my Lords, is one point. The next point to be considered will be, Whether, by the law of Scotland, reading is a statutory solemnity? That, I apprehend, must also be decided by looking at the words of these statutes. The next question will be, If it is not a statutory solemnity,

July 17. 1823. is it what Mr. Bell calls a consuetudinary solemnity?—an expression with reference to which I have endeavoured to give some explanation already. In the next place, If it be not a statutory solemnity, but a consuetudinary solemnity; or if it be a statutory solemnity, and a consuetudinary solemnity; (though I do not see how it can be a statutory solemnity, unless reading is likewise a statutory solemnity), the next question is, Upon whom lies the proof that it was or was not read? Another question will be, If there must be proof that it was read, and you have decided upon whom lies that proof, which of the Judges is, in your Lordships' opinion, right?—those who hold that it must not only be a reading by some person, but that it must be a reading in the presence of the witnesses who are to attest,—or those who hold the contrary? Another question is, Whether acknowledgment be a statutory solemnity, (and your Lordships will attend to the words of the statutes when I read them); and if acknowledgment be a statutory solemnity equal to subscription, or tantamount to it, then, Whether an instrument (supposing a blind man to sign it) being on the face of it probative, the proof that there was such an acknowledgment lies upon the party who is using the deed; or whether, on the other hand, the proof that there was not such an acknowledgment lies upon the person who is impugning it? There are other considerations that I do not trouble your Lordships with stating; but after we have got through all these, the question then will result to this, Whether your Lordships are satisfied that the judgment ought to stand? If it does stand, and if your Lordships are of opinion the judgment cannot be maintained on the ground on which it has hitherto been sought to be supported, What is the mode in which it is open to you to proceed, and what is the best course of proceeding?

Having, my Lords, said thus much for this day, I shall, merely for the sake of saving your Lordships' time on Friday, read to your Lordships to-day the statutes which are principally in question. I need not state to your Lordships, that in early times the seal of the party was sufficient evidence of the execution; but in the Parliament of Scotland in 1540 there is a statute which says, (c. 117)—'That na faith be given 'to evidentes sealed, without subscription of the principal or notar.'—'It 'is statute and ordained, that because mennis seals may of adventure be 'tint, quhairthrow great hurt may be genered to them that awe the 'men; and that mennis seales may be feinzied, or put to writinges after 'their decease, in harte and prejudice of our Soverain Lord's lieges; 'that therefore na faith be given in time cumming to ony obligatios, 'bondis, or uther writing under ane seale, without the subscription of him 'that awe the samen, and witnesse; or else, gif the partie cannot write, 'with the subscription of ane notar thereto.' The only words here that I apprehend can include a blind person, are, 'gif the party cannot write.'

My Lords, the next statute is the statute of 1579, which is entituled, 'Anent the subscription and inserting of witnesses in obligationis, and 'utheris writtes of importance.' Your Lordships know that in the law of Scotland there is a perfect distinction as to what are considered as

writs of importance. 'Item, It is statute and ordained be our Soveraine 'Lord, with advise of his three estaites in Parliament, that all con- 'tractes, obligationes, reversiones, assignationes, and discharges of rever- 'siones, or eiks thereto, and generallie all writs importing heritabil titil, or 'utheris bondes and obligationes of great importance to be maid in time 'cumming, sall be subscrived and seilled be the principal parties, gif they 'can subscrive, utherwise be twa famous notars, befoir four famous wit- 'nesses, denominat be their special dwelling-places, or sume uther evident 'tokens, that the witnesses may be knawen, being present at that time; 'utherwise the saidis writis to mak na faith.' Here the argument by which it must be contended that blind persons are to be considered as within the meaning of this statute, must turn upon the words 'gif they 'can subscrive.' If a blind person can be shown by the law of Scotland, antecedent to these two statutes, to have been considered as a person, though he could write ever so well, not to be able to subscribe or write, then, to be sure, the statutory language will bear interpretation from the consuetudinary law which existed before the statutes. On the other hand, if that cannot be shown, it will be for your Lordships to say whether these two statutes requiring men so to subscribe can be taken of necessity, or by fair construction, to refer not to all such persons as shall subscribe, but to such persons as, having their eyes open, must be taken to have seen what they subscribed. July 17. 1826.

My Lords, the only other statute which has been referred to is the statute of 1681, which does not appear to me to bear very strongly upon this—that is, 'concerning probative witnesses in writs and executions.'—29th August 1681.—'Our Soveraign Lord, considering that by the 'custom introduced when writing was not so ordinary, witnesses insert 'in writs, although not subscribing, are probative witnesses, and by their 'forgetfulness may easily disown their being witnesses; for remeid where- 'of, his Majestie, with advice and consent of the estates of Parliament, 'doth enact and declare, that only subscribing witnesses in writs to be 'subscribed by any partie hereafter shall be probative, and not the wit- 'nesses insert not subscribing; and that all such writs to be subscribed 'hereafter, wherein the writter and witnesses are not designed, shall be 'null, and are not suppliable by condescending upon the writter, or the 'designation of the writter and witnesses: And it is further statute and 'declared, that no witness shall subscribe as witness to any partie's sub- 'scription, unless he then knew that partie and saw him subscribe, or 'saw or heard him give warrand to a nottar or nottars to subscribe for 'him;' (there is nothing here about 'writing,' your Lordships observe,) 'and in evidence thereof touch the nottar's pen, or that the partie did, 'at the time of the witnesses subscribing, acknowledge his subscription, 'otherwise the saids witnesses shall be repute and punished as accessorie 'to forgerie: And seeing writting is now so ordinary, his Majestie, with 'consent foresaid, doth enact and declare, that no witnesses but subscrib- 'ing witnesses shall be probative in instruments of seisin,' and various other instruments which are here mentioned, 'and that none but sub-

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'scribing witnesses shall be probative in executions of messengers, of in-
'hibitions, of interdictions, hornings, or arrestments; and that no execu-
'tions whatsoever to be given hereafter shall be sufficient to infer inter-
'ruption of prescription in real rights, unless the same be done before
'witnesses present at the doing thereof, subscribing: And that in all the
'saids cases the witnesses be designed in the bodie of the writ, instru-
'ment, or execution respective; otherwise the same shall be null and
'void, and make no faith in judgment, nor outwith.'

Now, my Lords, upon all these statutes together, your Lordships will find the opinions of the Judges both in the present case, and the opinions of the Judges in other cases which have been stated to your Lordships. They have gone the length certainly, in other cases, of holding that the reading to the party was a statutory solemnity, or they call it a solemnity which must be proved by the attesting witnesses; and being proved by the attesting witnesses, one Judge of great eminence, whom I have always heard spoken of during the 20 years I have been concerned in Scotch causes inside the Bar, and the previous time when I was concerned in them outside the Bar—I mean Macqueen—went the length of holding, not only that the attesting witnesses should be witnesses to the attestation, but to the reading; and that the fact that they were witnesses to the reading should be stated in the docquet. It was found out afterwards that that opinion could not be maintained without oversetting many decisions, and that opinion has not been since abided by. Upon the whole, the doctrines with respect to what are proper modes of executing instruments by blind perons, or persons unlettered, your Lordships will find, have shifted from time to time—have been from time to time considered in very different points of view by Scotch Judges—even in this case have been considered very differently by different Judges; and that we are now in this state, namely, that if the situation in which this matter is brought before us allows us to decide what is the law of Scotland—not what it was, but what it is—it will become necessary for your Lordships to record your opinions upon these doctrines, that they may be a guide in future. Let me say again what I have often said before, that if any body supposes that I ever have—(I hardly know what word to apply to it)—that I ever have thought of altering the law of Scotland instead of pronouncing the law of Scotland, he is totally and absolutely mistaken. It has fallen to my lot, after great consideration on the points, to find it impossible to agree in some judgments which have been under review here; but if I have mistaken at all, it has not been in attempting to alter the law of Scotland, but in deciding what is the law of Scotland. The forms of that law, I think, might be changed much for the better; and it may be my duty, when measures are brought before your Lordships, to state that they may be changed much for the better in point of substance and certainty; but when I am considering questions, not as one of your Lordships' House sitting in Legislature, but sitting here as a Judge, I hold it to be my bounden duty to deliver the opinion which I deliberately form upon the state of the law, as I conceive it to stand. I always regret if my view of it differs from those opinions for which I have a very great

respect; but while repudiating the idea of any intention to alter the law in judgment, I feel it my duty to give the opinion that I form, even if it is subject to the pain of its not agreeing with the opinions of those I highly respect. July 17. 1828.

My Lords, I will, with your Lordships' permission, proceed on Friday morning to examine the different opinions which have been given, and which are to be found in the books upon the subject, and then to make some observations upon the judgment to be pronounced by your Lordships, which I hope will close the trouble which I shall have to give to your Lordships.—Adjourned.

LORD CHANCELLOR.—My Lords, having, when we last met, stated at great, but I hope not unnecessary length, the circumstances of this case, I will take the liberty of commencing what I have to state to-day by calling your Lordships' attention back for a single moment to the state of the proceedings. The circumstances of the case may be found in the summons, the condescendence, the defence, and the answers to the condescendence; and it seems to me I do not represent too much to your Lordships, when I say that they contain not merely facts to be proved or disproved, but they state also reasonings upon the convenience and inconvenience, and danger and hazard, and so on, of instruments being executed in the manner in which they aver these instruments were executed. The pleadings to which I refer led to the issues which have been directed, and to which I must call your Lordships' attention once more, by pointing out particularly what those issues appear to have established, and what they appear to have left not established or in doubt, and what they appear to have found consistently or inconsistently.

My Lords, the first verdict is, 'that James Earl of Fife, at the date of 'the deeds under reduction, was not totally blind, though he could scarcely 'distinguish between light and darkness; that he was at that time inca- 'pable of reading any writing, written instrument, or printed book; that 'he could not at that time discover whether a paper was written upon or 'not.' Now it seems to me, that with respect to that finding, whether it expresses so much or not, is not very material, but that we may safely conclude that he was blind. If your Lordships should not think you are justified in determining that he was totally blind, still, with regard to such a case as that under your Lordships' consideration, it will be very much in the same state as if he was blind, because it has found that he was incapable of reading.

Then the next issue was this, 'Whether the deeds were read over to 'the Earl previous to the Earl's name being put thereto, and if so, in pre- 'sence of whom; and if read over to the Earl, whether they were all 'or any of them read to him at one and the same time, or at different 'times; and if at different times, whether they were deposited and kept 'in the room in which they were read, during the whole period which 'elapsed from the commencement of the reading till the name of the 'Earl was put to them as aforesaid, or where they were deposited?' The return to this finding is this, 'That the deeds were read over, previous

July 17. 1823. 'to the said Earl's name being put thereto, in the presence of Stewart 'Souter'—(that, I think, is the gentleman who is found to have a patrimonial interest under the deed), 'and Alexander Forteith Williamson, or 'one or other of them:'—a very singular finding, we should think in this part of the country. The finding expresses 'that the deeds were 'read over in the presence of Stewart Souter and Alexander Forteith 'Williamson, or one or other of them;' but the Jury, who find that they were read over in the presence of those persons, have not found in the presence of which of them—a circumstance which, one should think, would very well be in the knowledge of the Jury, if they were proved to be read to one. 'That it is not proven whether they were all read to him 'at one and the same time, or at different times; but one was read at 'the time the deeds were signed. There is no proof whether they were de-'posited and kept in the room in which they were read, during the whole 'period which elapsed from the commencement of the reading till the name 'of the said Earl was put to them as aforesaid, or where they were de-'posited.'

With respect to the third issue, they find 'that the Earl put his name 'to the deeds by feeling for the finger or fingers of another person on the 'spot for signature, and was no otherwise assisted than as above de-'scribed.' As to the fourth issue, they find that the said Earl put his 'name to the deeds at one and the same time,' or, as they would express it in the text-books, unico contextu.

With respect to the fifth issue,—Whether the Earl put his name to 'the deeds under reduction in presence of the two instrumentary wit-'nesses, or either of them, or did acknowledge his subscription to them 'or either of them, or at what period he made such acknowledgment,'—the verdict finds, 'that he did put his name to the deeds under reduction 'in presence of one instrumentary witness, viz. Alexander Forteith Wil-'liamson; but it is not proven that the Earl did acknowledge his subscrip-'tion to George Wilson, the other instrumentary witness.' My Lords, I pray your Lordships' attention to these words: 'But it is not proven 'that the Earl did acknowledge his subscription to George Wilson, the 'other instrumentary witness.' And I take leave to call your Lordships' attention again to those words, which I humbly requested might be given the other day, because hardly any thing said here fails of travelling across the Tweed, and of being very much misrepresented elsewhere—'It is not 'proven that the Earl did acknowledge his subscription to George Wil-'son, the other instrumentary witness.'—Now upon that I observe with the utmost confidence, that if a Jury in this country were to return a verdict in these words, if the question addressed to them was, whether it had been proven that he did so and so, they would have been very well entitled to return a verdict in these words, that it had not been proven; but if the question put to them was, whether he had acknowledged his subscription, they would have returned that he did not acknowledge his subscription; for whatever is not proved is taken not to exist; and it seems not improper, the first time we have a case here of a finding of a

Jury on a case of very great importance, to remark the circumstance; July 17. 1823.
though I understand, in the criminal law of Scotland, where they do not find guilty, and where they have a disinclination to find not guilty, they are in the habit of saying not proven, and the person who is under trial is therefore, in contemplation of law, considered not to be guilty; yet, on the first appearance of such a verdict as this in a civil case, it did occur to me that I was not stepping very much out of the situation in which I stand, if I stated that here at least we do not perfectly know at this moment—(information may be given us upon that point by the Court of Session in Scotland)—but we do not know, according to our forms, whether that which they only said was not proven is to be taken merely as a thing not proven, or a thing not existing.

My Lords, the sixth issue was this:—'Whether the Earl was, until 'the dates of the deeds under reduction, or at a later period, a man re- 'markably attentive to, and in the use of transacting every sort of business 'connected with his estates, and in the practice and habit of executing, 'and in fact did execute, deeds of all sorts connected with his own affairs, 'by subscribing the same with his own hand, and without the interven- 'tion of notaries?' The inquiry made in this issue is an inquiry that perhaps has not a direct and immediate connexion with the question which was before the Court, and is now before your Lordships, unless it is to be taken in the way which I am about to point out to your Lordships, that issue being found in the affirmative. The finding is, 'That 'the Earl was in the practice and habit of executing, and in fact did 'execute, deeds of all sorts connected with his own affairs, by subscribing 'the same with his own hand, and without the intervention of notaries.' That is a fact which must convey to your Lordships, as far as I can look at that fact, that it may be of great importance what is to be the decision of the present question; because, if the fact be that the subscription of the Earl of Fife, in the manner in which that subscription is made here, is not available to give efficiency to the deed, then you are to recollect that this person having been for a long period of years very much in the same state as he was at the time he executed those deeds, on the same ground on which you deny validity to these instruments, you must deny validity to many other acts of the Noble Lord. To what extent that might go, one should not very much have inquired into, unless it had been thought necessary to make that inquiry in directing these issues; but it is of some degree of importance, I think, when your Lordships come to look at the cases which have been decided in the Court of Session—in some of which it was held that the reading over was a solemnity—and in others in which it was held that it must be noted in the docquet that the deed was read over; and when you call to mind that by and by, when it was found that that holding would destroy a great many deeds executed by a nobleman who was blind—I mean the late Duke of Montrose—that was a doctrine the Court of Session did not think fit to abide by. It is a question whether deeds, not only of the Earl of Fife, but deeds of many others, executed under the advice of lawyers,

July 17. 1823. may not be most largely affected by a decision, that where a man is blind and cannot read, but where, though a blind man, he can write, he is not at liberty to execute by his subscription, but must employ two famous notaries (according to the act of Parliament) and four famous witnesses.

My Lords, then follows the seventh issue, and upon that seventh issue the finding is this: 'That the only means which the Earl took to ascer-'tain that the deeds under reduction were conform to the scrolls of deeds 'prepared by his agents under his special directions, were his having 'heard the said deeds read over to him.' So that the Jury who first tried this, expressly assent that he had had the deeds read over to him; and upon this seventh issue no new trial was granted. The verdict, therefore, of the first Jury upon that fact is no otherwise disturbed than it can be taken to be disturbed by inference drawn from the finding upon the new trial of the second issue. I have before stated to your Lordships what the second issue was upon the motion for the new trial. The Jury found, in terms the exact meaning of which I certainly am not sufficiently informed of, but which I should hold to amount to very little indeed as matter of finding, if it were on an English record—'that 'it has not been proven that the deeds under reduction were read over 'to the Earl of Fife, previous to the Earl's name being put thereto.' This is certainly a negative finding by this Jury, and it is in direct contradiction to what the former Jury had found upon the trial of the seventh issue. It is impossible to state that they are consistent with each other; and it will be for your Lordships to consider whether you can be satisfied that, there having been this latter trial, you are called upon to pay any attention whatever to what is found upon the seventh issue on the former trial.

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My Lords, such being the state of the facts, I will put your Lordships in mind again of Lord Pitmilly's interlocutor, after discussion on the three principal points of the objection to the deeds, namely, 'First, That 'they were not, as the law requires where the granter of a deed is blind, 'attested by two notaries and four witnesses, with the usual formalities 'that are observed when deeds are executed in that form. Secondly, 'That the deeds were not, as the law requires where the granter of a 'deed is blind, read over to Lord Fife before signing; and there is no 'evidence that he was informed of the contents of those deeds. Thirdly, 'That the deeds were not executed in terms of the act 1681, in regard 'that one of the two pretended instrumentary witnesses did not, as the 'act requires, either see the granter subscribe, or hear him acknowledge 'his subscription,'—as to which the finding upon the issue is, that it was not proven that he did so; and that opens to a question which I shortly adverted to the other day, namely, upon whom, according to the law, the onus probandi is, that the Earl did acknowledge his subscription? Whether the instrument was in that state in which the law of Scotland would consider it as a probative instrument, to have faith given to it, until those who sought to reduce it proved that that faith ought not to be given; or whether, on the other hand, according to the law of Scot-

land, the user of the deed, though it be probative, is bound to prove the fact which the probative writ of itself in general cases records? Or whether, on the other hand, the person who seeks to reduce the deed is not to take upon himself the onus probandi that that fact, which the instrument so produced alleged and considered to be established, is in truth not the fact? July 17. 1823.

My Lords, when this case came before Lord Pitmilly, his Lordship, whose authority certainly is very high, stated as a doctrine of law, and he finds, 'that a person about to execute a deed of importance, who, at the 'time of the execution of it, is, in the words of the verdict in this case, 'not totally blind, though he can scarcely distinguish between light and 'darkness, and is incapable of reading any writing, written instrument, 'or printed book, and cannot discover whether a paper was written on or 'not, and who can only put his name to the deed by feeling for the finger 'or fingers of another person on the spot for signature, is not only en-'titled in law, but ought to execute the deed by means of notaries and 'witnesses, in terms of the act 1579, c. 80.' Your Lordships will permit me to point out to you, that here are two propositions in fact brought forward in this finding,—the one, that a person in his circumstances is *entitled* in law to execute the deed by means of notaries and witnesses, in terms of the act of 1579, c. 80; and if the question were now only, whether he was entitled in law so to do, the necessary inquiry would be, whether the act of 1579 does apply to a person in those circumstances, capable of writing and subscribing? With respect to the other proposition, it is not only that he is *entitled* in law so to execute an instrument, but that he *ought* so to execute the instrument; and an observation, I think, fell from the Lord Justice-Clerk, which I observe in the notes of the Judges, which appears to my observation quite applicable to the case, namely, that if he ought to execute it so, the finding whether he is entitled to execute it so or not does not signify; because, if he ought so to execute it, he must so execute it in order to give it validity, and then that second proposition, which, in my humble consideration, includes the first, as the Lord Justice-Clerk puts it, brings forward this question, whether that act of 1579 makes it incumbent upon a blind man who can write to subscribe in the mode pointed out? Whether he has executed other deeds or not, may be matter of very useful consideration, if you are considering what the Legislature ought to do; but whether the act of the Legislature, by the statute of 1579, has made a person who is able to write incapable of executing a deed by subscribing, or whether he must, under the exigency of that act, if he means to execute a valid deed, execute it, not by subscription, but by notaries in the presence of four witnesses?

My Lords, the Lord Ordinary, however, goes on further to find, 'that 'there is no sufficient authority in the law of Scotland for concluding 'that a deed signed by a person in the situation above described in pre-'sence of two witnesses in the usual manner,'—that is, by his own subscription,—'is null, or can make no faith, provided the deed be proved to

July 17. 1823. 'have been distinctly read over to the granter in presence of the wit-
'nesses, immediately before the subscription is made, in order to afford
'that degree of evidence which the law requires, and which is plainly ne-
'cessary to show that the deed given to the granter to subscribe is truly
'and in all its parts his deed which he intended to execute.' Now, my Lords, taking this proposition, according to the terms in which it is expressed, to be strictly true, it goes to a certain extent to contradict the proposition in the first finding, that he ought to execute the deed by means of notaries and witnesses, in the terms of the act of 1579; because, if there be no sufficient authority in the law of Scotland for contending that a deed signed in the manner which is stated in this second finding—that is, a deed subscribed by the party, and proved to have been distinctly read over to the granter in the presence of the witnesses immediately before the subscription,—affords that degree of evidence which the law requires, and which is necessary to show that the deed given to the granter to subscribe is truly and in all its parts his deed which he intended to execute. This must be taken to be a proposition, affirming that the law of Scotland affords no authority whatever for stating that if a blind man subscribes a deed, and that deed is read over to him in the presence of the attesting witnesses immediately before his execution of it, that will not be a good deed; and yet the statute of 1579 must be a direct negative upon that proposition, if it be true that a blind man, though the deed is read over in the presence of the witnesses and immediately executed, is brought under that statute, and is entitled, and ought to execute the deed with two notaries and four witnesses.

Your Lordships here also observe, that the Lord Ordinary says, 'that 'there is no sufficient authority in the law of Scotland for concluding 'that the deed signed by a person in the situation above described, in 'the presence of two witnesses in the usual manner, is null, or can make 'no faith, provided the deed be proved to have been distinctly read over 'to the granter, in presence of the witnesses, immediately before the 'subscription is made.' Now, one great defect in this finding (if I may presume to use that expression, meaning only a defect in this sense, that it does not inform my mind sufficiently upon the subject,) is this, that I want to know where there is an authority in the law of Scotland for saying that it shall be bad, unless it is distinctly read over to the granter—and not only unless it is distinctly read over to the granter, but unless it is distinctly read over to the granter in the presence of the attesting witnesses, immediately before the subscription is made. When I say where is the authority? I do not mean to say—far from it—that there are not to be found in the different statements of Judges upon cases that have arisen, the opinions of some, that the deed should be read over to the granter—that it should be read immediately before the execution—that it should be read in the presence of the witnesses. I am very far from saying there is not that species of authority which requires great attention, and is entitled to much respect, considering what has fallen from the lips of Judges who have had these cases to consider; but then I say, there is

that same species of authority on the other side, and I wish to know where is the decision which renders necessary the condition which is required in this second finding, in order to authorize you to say, that if a blind person subscribes, and that subscription is attested in the presence of two witnesses, the deed would be null and void if it is not read over in the presence of those witnesses, and read over immediately before the execution of the instrument. July 17. 1823.

My Lords, the next finding is, 'that the fact of a deed subscribed by a 'blind man having been read over to him in presence of the witnesses be-'fore subscription, is not a fact which is to be presumed in law, from the 'attestation of the witnesses to the fact of his having subscribed the deed, 'but that the fact of the reading over must be proved by the user of the 'deed, when it is disputed.' Your Lordships here then observe, that this finding with respect to the having the deed read over is stated here to be—that this is not a fact which is to be presumed in law from the attestation of witnesses to the fact of his having subscribed the deed. In the first place, this proposition, I apprehend, means to assert that it is a solemnity, if not required by the statute, yet absolutely required by some other authority, (which, I apprehend, must be some consuetudinary authority, or the authority of the common law,) that it should be read over. And, secondly, that this proposition is meant to negative the possibility of a blind man sufficiently knowing the contents of an instrument, unless it is so read over—that he cannot know the contents of it in any other way. This, your Lordships see, is quite a distinct proposition from its being read over in the presence of witnesses; for, consistently with this, it might be read over, and the two witnesses then called in to attest the execution; but this lays it down as a proposition that it must have been read over to him, and that, because it must have been read over to him, the person who is to use the deed is to prove that it was read over to him. That likewise is pregnant with another position, which is, that though the deed should be ex facie probative, yet it is necessary that the person who produces that deed, ex facie probative, shall prove something else, in order to give it faith in the first instance, and that it is upon the user of the deed, and not upon the person who is seeking to reduce the deed, to show that the reading which was necessary was attended to, and that the instrument was read to the party.

Then, my Lords, he goes on further to state, 'that it has been estab-'lished by the verdict of the Jury on the second trial, that it has not 'been proven that the deeds under reduction were read over to the Earl 'of Fife previous to the Earl's name being put thereto.' Now, as Lord Pitmilly here finds that it has not been proven that the deeds under reduction were read over to the Earl of Fife previous to the Earl's name being put thereto, nothing can be stated with more propriety—(if I may thus presume to comment upon the propriety or impropriety of the findings of any learned Judge)—nothing can be stated with more propriety than this, when that learned Judge had, in the finding immediately preceding this, stated that the onus probandi that the deed was read over

July 17. 1823. was upon the user of the deed, he very distinctly goes on to say, that it has not been proven that the deed was read over;—that is to say, that he who was using the deed, having taken upon himself the burden of proving that the deed was read over, has not proved that the deed was read over; therefore, as against him, it must be taken that the deed was not read over, whatever sense I put upon the words—'that it was not proven.'

Then follows, my Lords, what I read the other day, which I will state again, that the interlocutor of the Lords of Session 'reduces the trust-'disposition and the deed of entail, and remits to the Lord Ordinary to 'hear the parties on the other conclusions of the libel, and to do thereanent 'as he shall see cause.' Now, I repeat the observation which I took the liberty to make the other day upon this, by saying that the summons in this case not only calls for a reduction of the trust-disposition and the deed of entail, but it likewise calls for a reduction of the deed of November 1808, (that deed being a deed which alters the instruments of October 1808, those instruments which are here called the trust-disposition and the deed of entail); the latter instrument certainly not being, if I recollect it rightly, an instrument of conveyance, but being nevertheless an instrument professing to make an alteration in the former instruments; and if it is to be considered as referred back to the Lord Ordinary to do what he may think fit and just to be done in reference to this deed of November 1808, it being then to be concluded, I suppose, that because the deeds of October 1808 are thus reduced, he is then, ex consequentia, to reduce the deed of November 1808. But then it becomes a question, Whether that deed of November 1808 is not a very material deed indeed, with reference to the deeds of October 1808, unless you are to say that it is of absolute necessity that the deeds of October 1808 should have been read over to the testator in the presence of the witnesses, because he was blind; or should have been executed by notaries, with the attestation of witnesses, because he was blind; and in either way of putting it, it will become necessary to pay some attention to that deed of November 1808, as evidence in the cause, both as evidence with regard to the validity of the instruments of October 1808, provided you make out that there was a sufficient knowledge of the contents in the person executing those instruments, and also for another reason, that that deed might have been good evidence on the trial of the issues, in which it appears to me, as far as we are informed, never to have been spoken of. If I am wrong in that, I should be glad to have it stated now, but I cannot find that it was. I am not now on the question to whom it is to be imputed that it was not produced and acted upon before the Jury; but I do not understand it to have been brought forward in evidence in any way. If I mistake that fact, I consider that a circumstance of so much importance, I should be glad to be corrected in it by those who know more accurately how the fact was.

My Lords, it was not my intention to say one word more than I have said to your Lordships about the Roman law, or the law of England; I will say but one word, and that is only to repeat, that it is impossible to say that the deeds of a blind man in Scotland are required either by the statute, or by any thing else we have heard of, to be executed in the same

way as the Roman law required a testament to be executed. I do not know what inference can be drawn from any thing which can be stated to be the law of England, repeating only, that I do not want to have the law of Scotland made like the law of England; that is a perfect mistake of any intention of mine; but what can be drawn as matter of common sense from the Roman law, or that can be drawn as matter of common sense or judicial consideration, with reference to common sense from the English law, may be fairly considered, and if you have statutes in pari materia, those also may be fairly enough looked at. July 17. 1823.

Now, I will call your Lordships' attention to one statute respecting wills—our statute of frauds, as it is called—it is the 29th of Charles II.—that says, 'That all devises shall be in writing, and signed by the party 'so devising the same, or by some other person in his presence, and by 'his express directions, and shall be attested and subscribed in the pre-'sence of the said devisor by three or four credible witnesses, or else they 'shall be utterly void and of none effect.' Now, my Lords, I do not apprehend, that, according to the law of England,—whatever may be to be found in dicta or in judgment, on giving opinions where they have, or where they have not sustained wills,—that if you prove in the case of a blind man that he had signed a deed because he could write, or if you prove that he had signed a deed, because you prove the attestation of his signature by three witnesses, for it is his signature that the statute requires the witnesses to attest; in that case, I should apprehend, primâ facie, that is a very good will; and to illustrate what I have to say upon that, and to show your Lordships the consequence if you do not find that to be a good will, let me refer your Lordships for a single moment to a case which was mentioned the other day from Bosanquet and Puller.—My Lords, that was a case in which the testator, being eighty years old, and blind, in July 1801 applied to a friend of the name of Davis to make his will, and dictated every word himself, making a devise in favour of the lessor of the plaintiff, who was his stepdaughter, and lived with him, to the disadvantage of the defendant, his son. After the will was written by Davis, the testator went into the room where the lessor of the plaintiff, with other persons, was, and desired Davis to read it over, and then said, Now, Nancy, are you satisfied? Davis then took the paper away with him to get it copied, and when he brought it back 'fairly copied, two 'months afterwards, the testator made an alteration in it;' but he could not by his eyes at all determine whether that paper was the same paper or not, 'and perfectly understood what he was doing;'—that understanding he could not have by the means of his eyes, for eyes he had none to make use of.—'After the alteration made in the will, it was executed by 'the testator in the presence of Davis, and the three attesting witnesses 'named by the testator. The will was not read over in the presence of 'the three attesting witnesses, before it was signed by the testator, but 'was merely placed before him in their presence, and executed;'—and this was held to be a very good will of a blind man.

Now, I desire to ask what would have been the case with that will, if doctrines we have heard of were doctrines in our law—it does not signify

July 17. 1823. whether they are doctrines in our law or not with reference to the Scotch law, save that, if you are left in doubt by the text of the Scotch law, what is the construction of it—if you are left in doubt whether blind men are within the intent of the words used which do not in words mention them at all—I should be glad to know what would have been the consequence if these circumstances had taken place? Here were three attesting witnesses; if these three attesting witnesses had survived the testator, all they could have said was this—'We were called into the room; the 'paper was laid before this blind man; he signed it, and we, according 'to the statute, attested his subscription.'—'Was it read over to any one 'of you?'—'No, we do not know a word of it—it was perhaps the pur- 'pose of the testator to take care that we did not know one word of it.' But then it is said—'Here was Davis to prove, that, two months before 'the testator dictated, and he took down what was to form the will—that 'two months afterwards he brought the same paper to the testator, and 'told the testator it was the same paper, for the testator himself could 'not determine whether it was the same paper or not, and that he made 'an alteration in it.' There is this difference, that in this case he made the alteration in the identical paper; in the case before your Lordships, the alteration was made by another instrument—not an immaterial circumstance. But how is this to go, if the attesting witnesses happened to die before the will was to be proved? You prove their handwriting; and the law, which presumes every thing to be rightly done till the contrary is shown, determines that to be a good will; but if our law turned on the same words as are in the Scotch statutes, and under them it was held that you must prove it to be read over, there is no person who could prove that except Davis; and suppose Davis had died, who could prove it at all?

It has now been determined in the case of Yorkstoun v. Grieve, in Scotland, that reading is not a solemnity—that the reading need not be in the docquet; the reading, therefore, the witnesses do not attest, and what the witnesses do not attest cannot be taken to be true by proving the subscription of the witnesses. You will infer that the witnesses saw every thing rightly done which the witnesses are to attest; but if reading is not necessary—if reading is not a solemnity required by the common or the statute law, the witnesses are not to attest it, whatever was the opinion, in Aglianby's case, of many respectable Judges, that the reading must be noted in the docquet of attestation—that has been overruled since;—the reading, therefore, need not be attested in the docquet of attestation; and the consequence of that is, that if reading be a thing necessary to be proved, it is not proved by the mere attestation of the witnesses, who expressly state that they never heard one single word of the will read. Your Lordships see, therefore, that if we were to introduce this rule into the law of England, we should be shaking wills, dispositions, and so on, which have never been held to be subject to any doubt whatever, or to any observation, further than this, viz. that the proof of reading over the will to a blind man is, because a blind man may be so

much more easily defrauded, and so much more easily imposed on, than a man who can see; and I look upon an unlettered man to be very much in the same circumstances, except that his eyes will enable him to identify the paper better than a blind man's feeling can do. I look upon them to be very much in the same situation, that the want of that care, and caution, and attention, would be a circumstance of very great weight, if you were imputing fraud and imposition; that then, undoubtedly, connected with other circumstances, it does come to be a circumstance and a fact of great weight, and of great consequence, that, in the case of a man who cannot read himself, it shall be shown that the instrument was not read over to him; but I have no conception that that is required in our law. I may be wrong; but if I am, I have been in this error many years. I have always considered, that if the Jury can be satisfied that the testator knew the contents of the instrument, that will be a good instrument, notwithstanding his want either of learning or of eye-sight. July 17. 1823.

Now, my Lords, in looking at the different propositions which have been stated in this finding of Lord Pitmilly, and which I must understand to be affirmed by the Court of Session, I certainly approach the consideration of them with all the fear and apprehension that necessarily belongs, and that ought to belong to, and to affect the mind of a person not very conversant with Scotch law, in dealing with propositions laid down by a Lord Ordinary of very great eminence, and affirmed by Lords of Session of great experience; but I must look at this, not only with reference to the question of law, but how the facts have been established,—whether they have been or not sufficiently established by the verdicts, upon the clear establishment of which facts those legal doctrines have been propounded and stated.

My Lords, in this view of the case, as the question before us must be, Whether we shall stop here and affirm this judgment at once, or whether we shall proceed? I really might say no more at present to your Lordships than this, that I do not find my mind so informed by the verdicts upon these issues, that I can with confidence apply any doctrines to findings expressed as these are, and that, if it is necessary to have the facts fully established, it does appear to me that there must be further investigation with respect to the actual circumstances of this case, and more especially regarding what has or has not passed with reference to this deed of alteration in November 1808. There, my Lords, I might stop, advising your Lordships simply to put it into a course of further inquiry; but, my Lords, I do not think that will be a useful proceeding, and I do not know whether it would not be better at once to affirm the judgment than to stop there; for I am quite sure, that, whether you direct an issue, supposing you can do it under the statutes, or whether you direct the Court of Session to direct another issue, by directing a general issue, always recollecting that where a fact is to be tried under the authority of the Jury Court in Scotland, it is a fact to the trial of which the presiding Judge must apply the law of Scotland with respect to the doctrines generally, and the law of Scotland with respect to evidence; and recollecting that this is a

July 17. 1823. case in which the law of Scotland, with respect to the doctrines generally, and with respect to evidence, requires to be extremely well considered. I am exceedingly apprehensive, indeed, I may fairly say I have no doubt, that if, without findings by this House, issues were to be directed, whether those were all the deeds of Lord Fife, or issues directed on all the three deeds, whether these were the deeds of Lord Fife or not, the matter would be, in all human probability, so discussed as not to be satisfactory, and there is no blame imputable to any body that it would be so discussed; because, when your Lordships look to what fell from the Judges in Lothian's case, commonly called Aglianby's case—when you look to what has fallen from the Judges in other cases—when you look to what has fallen from the Judges in this very case, in the notes on your Lordships' table, I think any man might very fairly say, it is one of the most difficult things in the world for a Judge to determine, at Nisi Prius, what is the doctrine of the law of Scotland in respect to how a blind man must execute his deeds.

Then, my Lords, I look at the case in this point of view:—First, Is it necessary there should be further investigation? Secondly, If it is necessary there should be further investigation, in what form and manner should that investigation be made? And I have looked at this latter question with a great deal of anxiety, for this reason among others: I may mistake the fact, and I have no hesitation in saying I may mistake the fact, as to what have been the points of law that have been already discussed in the Court of Session. Now I mention that for this reason, will your Lordships allow me, after having had experience in these matters as much as, in all probability, I can have, and which certainly has been more than any person who has had to administer justice in Scotch matters ever had, who has presided on your Lordships' Woolsack, taking into account the great number of years in which I was concerned in arguing the cases of Scotch suitors at your Lordships' Bar—But I have always been of opinion (and I take the liberty in the close of life to state it) that there has been a great difficulty in appeals in this view, that you begin with a summons which states a great variety of reasons of reduction; when they come to the end of it in the Court of Session, they say 'sustain the reasons of reduction.' It may be that they find, in that language, 'sustain the reasons of reduction,' in many many cases, where perhaps one of the very reasons for reducing the deeds so stated in the summons they think a sufficient reason; but if that sufficient reason could not have been established in point of fact, you will find, by looking at the notes of their judgment, that with respect to all the other reasons they did not mean to sustain them;—they either meant to say nothing about them, or in many cases they would have assoilzied the defenders, because they could not have sustained those reasons of reduction.

Now, my Lords, that a practice of that kind does generate a great deal of legal proceeding is to be expected; but I feel my difficulty in so stating it, as to remove the possibility of any suspicion that I am treating the Judges of the Court of Session without that great respect I know to be

due to great and honourable men. My Lords, I think the House of Lords is in some measure to blame for it; for, when a cause has come here, if you look at the judgment here, you will find this House has fallen into the same course: it has sustained generally the reasons of reduction, or has denied generally the reasons of reduction; and if your Lordships look back to some cause which was heard twenty years ago, and refer to the book upon your table, you will find there a sustaining of reasons of reduction, on which perhaps not one word was said in the cause, or if one word was said in the cause, they were considered reasons for which you would not reduce; but you have said generally, 'sustain the reasons of reduction;' and then there has come a cause from Scotland, in which it was argued in the Courts below, that they ought to sustain every doctrine of law contained in the summons, because the House of Lords sustained generally the reasons of reduction. The learned Judges there say, that is not the meaning of sustaining the reasons of reduction; they are not content, and it is very natural they should not be content with that, after what has passed in this House, and then comes an appeal founded upon this. 'You sustained all the reasons of reduction in a case fifteen years ago; here is one of the reasons for reducing, found in this case, on which we proceeded in that case; and therefore, as you sustained all those reasons fifteen years since, sustain this one reason now, and decree accordingly.' The consequence of that is, we say, 'No, that has been the form of entering the judgment; but we did not mean to sustain one half of those reasons of reduction.' That has, therefore, I confess, appeared to me to be a practice which might be very usefully altered;—of course, however, we should be very careful not to alter our mode of proceeding without good reason. But I cannot help thinking we have been making some little progress, which I hope may be useful to stating in the judgment of this House, what are the reasons on which we proceed, and not only that, but of course, as flowing out of that, what are the reasons on which we do not proceed. July 17. 1823.

But, my Lords, I must make another observation, and that is, that it has happened that causes have been determined here, some lately, in which, upon looking at the papers upon the table, you found what perfectly satisfied your minds, either that the judgment should be reversed, or that it should be affirmed, or that it should be altered; and you have then stated why you reversed, why you affirmed, and why you altered. No sooner is the judgment pronounced, than you have had it stated, 'This is a new view of the case—this proceeds upon a discussion of the doctrine, not one word of which was stated in the Court below;' and undoubtedly, if you are not a Court of original jurisdiction, it is very much to be wished, that all the views of the case on which you proceed should have been first discussed in the Court below, the consequence of which is, that there is a remit made of the cause in some cases:—well, what is the effect of that? Why, my Lords, before the person who has now the honour to address your Lordships is three months older, he has communications made to him that this practice of remitting does occa-

July 17. 1823. sion such expense to the suitors, and so on, that it is to be hoped it will not continue. If, therefore, the House suffers itself to be affected by the intimation that the cause has not been considered on such a point in the Court below, and remits, the expense of the remit, the delay of remit, the increase of appeals, (for it is sure to come back again, after being considered below,) are complained of. If, on the other hand, you look at the case, as you are entitled to do, in reference to every thing which is in the cause, whether it is taken notice of in the Court below, or not taken notice of, every thing which ought to be discussed at your Lordships' Bar, whether it is discussed at your Lordships' Bar or not discussed, I say you are entitled to consider it, and that it is better, the question being for decision before the House—it is better, upon the whole, the House should decide the whole of the matter at once, and it must be for those who have not brought forward the discussion of such matters at all before the House, upon the record laid upon its table, to account for the circumstance—that the case had not been heard, and not been determined in that particular point of view.

I am aware there may be very many important cases on the law of Scotland, where the House would remit for its own information; but in these cases where the House would remit for its own information, it remits, because it is a duty to the public to take care, that in matters of Scotch law and Scotch doctrines, if the point is a very material point, it should have the very best information it can possibly have; but that is quite a different thing from stating that such and such a point was not considered below.

My Lords, I have made these observations, because, if your Lordships should be of opinion that there should be any further investigation of these matters, it is not perhaps an improper preface to what I have to say further upon the subject, that I have endeavoured to look to what have been the points which have been argued in the Court below in this case; and unless I mistake what have been the points which have been argued in the Court below in this case, I think the view that may be taken of this case by your Lordships does not go one iota beyond the points which have been so considered in this particular case in discussion in the Courts below.

My Lords, the first point is, is it necessary that a blind man should execute these instruments by two notaries and four witnesses?—and here do not let me be supposed again to speak with disrespect, either of the Court of Session or the Jury Court. My Lords, I know too well how difficult it is, even in this part of the island, where we are very conversant with the proceedings which are to take place before a Jury, when a Court both of Law and Equity is directing its proceedings;—I know too well the difficulty of being quite sure that one is quite right in these directions; forbearance of observation, therefore, would peculiarly belong to me upon such a subject; but a man must totally forget every thing which is likely to happen, if he supposes that you can send an issue down to trial in Scotland, and that they should be enabled so to model proceed-

ings there as you can in this country, where that means of trial has been had for centuries. July 17. 1823.

To be sure, in this country, if the Judges had been of opinion that a man who was blind was a man who could not, within the intent and meaning of this act of Parliament, write, and if there was no dispute whether he was blind or not—if one party said he was blind, and the other party admitted that he was blind, the Court would say, what have we to do but construe the statute? If, on the other hand, they denied that he was so blind—that he, Lord Fife, who had been executing, as the Jury found, all sorts of instruments by writing, was so blind as to be within the intent and meaning of the statutes, a man who could not write, if they denied the fact, you have nothing in the world to do but to try the fact, whether he was so blind as to be blind within the meaning of the word, according to the interpretation of the Scotch law, which would be a proper fact to be tried. But, on the other hand, after that one issue was tried, if the law of Scotland be, that a blind man is a man who cannot write, but who must use the subscription of notaries, and the attestation of four witnesses, in order to give effect to his deed, the moment it was found one way that he was not blind, or the other way that he was blind, there would have been an end of the cause as to that; because then it would follow, that within the intent and meaning of the statute, he was a man who had executed the deed, not by notaries in the presence of four witnesses, but by a subscription of his own, which, though a subscription in writing, was nevertheless not a subscription in that way of putting the case within the intent and meaning of the act of Parliament. In a general issue, all this might have been considered—might have been brought before the Court by bills of exception; and, finally, according to the terms prescribed by the act of Parliament, brought before this House.

Then, my Lords, the first question is,—Is a man blind, as I may state Lord Fife to be—a man who cannot write, within the intent and meaning of these statutes? My Lords, there is another way of putting that. Is he a man, who, before these statutes, would, by the common law of Scotland, have been under a disability upon the subject? I confess I have found no authority for that. On the contrary, that appears to me to have been so little understood, that the case of Coutts *v.* Straiton, which occurred in 1681, very much about the time of one of these acts, I think, contradicts that idea altogether.

Then the question, my Lords, must arise, first, upon the acts of the Parliament of Scotland. My Lords, the first statute which has been argued upon is the statute of 1540. Previous to that statute, I think, one might state without the authority of the statute itself, that for which it is sufficient authority, that a person might execute a deed, not by subscribing it, (in which case the doctrine about comparatio literarum, and so on, would apply,) but by merely sealing; and I have looked with some degree of diligence, but certainly with no effect, to find out whether there was any difference between a blind man sealing and a man who could see sealing. I can find nothing which leads me to a conclusion upon that, no doctrine laid

July 17. 1823. down upon it, nor no case decided upon it; and when I state all this negatively, I do it for the purpose of being informed, if it shall appear to those who hear me that I have in my researches missed any thing which is to be found upon this subject. That statute is in these words:—'Item, 'It is statute and ordainit, that because menys selis may of aventure be 'tint, quhairthrow gritt hurt may be generatt to them that aw the samin, 'and that mennis seales be feinzied, or put to writings after their deceis, 'in hurt and prejudice of our Soveraine Lorde's lieges: That therfore 'na faith be given in tyme cuming to any obligation, band, or other writ-'ing under ane sele, without subscription of him that awe the samin and 'witnesses, or ellis, gif the party cannot write, with the subscription of 'ane notar thairto.' Now, my Lords, upon the subject of the party signing, you will find a case, which I cannot immediately refer to, (being without my glasses, very much in the case of the late Lord Fife at this moment,) in which it is expressly stated by one of the Judges, that the statute makes no distinction between a blind man and a man who can see, provided he can write, and then he lays down this doctrine:—'We 'never can carry the requisites of the statutes further than the statutes 'themselves direct; the act is silent as to this particular; therefore, we 'should be making a new requisite which the statute does not make, and 'that we Judges have no authority to do.'

Now, my Lords, I am ready to agree, and it is for that reason I have so repeatedly desired to be corrected if I am incorrect—I am ready to agree, that if it can be shown by decision before this statute, or by decision subsequent to this statute, that a blind man was to be taken as a man incapable—if it can be shown that before this statute there was a difference between the execution of blind men and men who could see, so as to raise the distinction that one should be considered as not being able to write, and another should be considered as a man who could write, notwithstanding he could not see;—if that distinction can be shown, it will certainly go a great way to authorise one to say that when the statutes spoke of one who could not write, they spoke of a person who might be distinguished as a blind person, able to write, and yet not able to write in what I may call the common law of Scotland; and a person who being able to see was to be taken as a person who could write.

My Lords, the next statute, and the only other of any importance, is that which discontinues the custom of writing deeds by pasting the sheets of paper one to another, and allows the writing book-wise; for there are decisions upon that statute which go to what is considered to be requisite to be in the attestation, and what they do not consider as requisite to be in the attestation. There will be found in Mr. Bell's book a long discussion upon what are to be noted in the attestation of deeds that are written book-wise. Your Lordships recollect the statute requires that a deed written book-wise shall be signed on every page of it; and questions have arisen how far the fact of signing on every page is to be matter in the attestation, and that likewise is to be decided upon the question, what is a statutory solemnity?

Then, my Lords, the next statute which has been considered material is the statute of 1681. Now, there does not appear to me to be in that statute one single word upon this subject. 'Considering, that by the 'custom introduced when writing was not so ordinary;' so that this statute of 1681 seems, as matter of history, to show that when the statute of 1540 was made, writing was not an ordinary thing among the lieges of Scotland. They can write now extremely well; but that does not appear to have been the case in the year 1540. 'Witnesses insert in writs, 'although not subscribing, are probative witnesses, and by their forget-'fulness may easily disown their being witnesses;'—and it proceeds, 'for 'remeid whereof, it is enacted and declared, that only subscribing wit-'nesses in writs to be subscribed by any party hereafter shall be proba-'tive, and not the witnesses insert not subscribing; and that all such 'writs to be subscribed hereafter, wherein the writer and witnesses are 'not designed, shall be null, and are not suppliable by condescending 'upon the writer, or the designation of the writer and witnesses: And it 'is further statuted and declared, that no witness shall subscribe as a 'witness to any party's subscription unless he then knew that party and 'saw him subscribe, or saw or heard him give warrant to a notary or no-'taries to subscribe for him, and in evidence thereof touch the notar's 'pen; or that the parties did, at the time of the witnesses subscribing, 'acknowledge his subscription.' Your Lordships observe these words: 'That the parties did, at the time of the witnesses subscribing, acknow-'ledge his subscription, otherwise the said witnesses shall be repute and 'punished as accessary to forgery.' Now, upon reading this, it does not appear to me that there is one word in it which can alter the state of the question upon the construction of the original statute of 1579; and it does appear to me, I confess, on looking at the English statutes and the Scotish statutes, that the subscription is the thing which the party is to attest; and it is very clear that if a person can see, the subscription is the thing he is to attest, and because the party can see, and seeing—provided, I mean, he is a lettered man—can read, there is no doubt that the presumption of law is that he knows the import. The question is, as it seems to me, looking to this upon the authorities, whether reading in the presence of the witnesses, or reading in the case of a blind man, is that which, if it cannot be presumed, can or cannot be proved by any thing but the actual proof of the fact of reading—that is to say, if it can be proved, however satisfactorily, that a blind person executed an instrument who had been or who had not been, but particularly who had been in the habit of subscribing instruments though he was blind, and multitudes of instruments which he fully understood, though it could be proved that not one of them was read to him;—yet if the Jury could be satisfied that he perfectly understood what he was executing, all the proof is short of giving validity to those instruments, unless there is a specific proof by some one that that instrument had been read over to him. Now, my Lords, I do not mean to say that on looking into the notes in Lothian's case, which I had the honour to argue at the Bar, that there

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July 17. 1823. was not, to put it fairly, admission by the counsel at the Bar under their signature; and though I forget at this moment with whom I had the honour to be counsel, I have no doubt you will find, on reference to the Cases, that they were men of high professional character at the time; and though I do find that into the bargain in the doctrine laid down by the Judges, as the notes are given to the world in Mr. Bell's work, there is a great deal there said, from which you would imply that the instrument must be read. I admit that there is: But, my Lords, in the next place, there is a great deal to be found in those books, with respect to which the different Judges who gave their opinions at that time certainly differed very widely as to what will or will not give validity to the instrument of a blind man. There is certainly a great deal of that case, which, unless I misunderstand the subsequent cases, the Judges have found it very difficult to abide by; and in this I am confirmed when I look at the notes of the Judges in the Court of Session in the present case, and when I recollect that in the case of Yorkstonn v. Grieve they have in a great degree overlooked the doctrine of that case, which had been maintained by a man of no less authority than the Lord Justice-Clerk of that day. Let it be observed, however, that Lord Braxfield, in an opinion of his given in the year 1770, has not the least difficulty that a blind man may subscribe. I do not know whether he does not go further, and say that the deed ought to be read over; but that a blind man may subscribe was the opinion he gave in the year 1770. His opinion ought to be taken on the two points; reading he seems to require—that I admit; but the deed being read, he says blindness is no objection.

My Lords, on looking at the notes of the doctrines of the different Judges whose opinions have been cited in the present case, and which opinions have been laid on your Lordships' table, there is hardly one single point with respect to this case in which they agree. Upon the point, whether subscription of a blind man will do, the majority are of opinion that it will do—that it is sufficient. On the point of reading, the majority are of opinion that the instrument must be read; but then as to whether the instrument must be read in the presence of the witnesses, or whether the instrument need not be read in the presence of the witnesses, provided it is read over in any other person's presence, on that point also they differ most materially; and as to whether reading is a solemnity within the statute, a large majority of them are of opinion that it is not a solemnity within the statute;—and there again, if you are to look to the opinions of the Judges in order to determine what is the law upon the subject, you have not only to go through that unhappy conflict which belongs to the question, which is the best opinion of modern Judges; but if you look to the opinions of the Judges in Aglianby's case, you will find there was a difference of opinion among the Judges. Lord Justice-Clerk, I recollect, (I do not mean the present Lord Justice-Clerk, but the Lord Justice-Clerk at the period of the case of Aglianby,) was of opinion the reading must be mentioned in the docquet.

No doubt, it is a very imprudent thing ever to let a blind man execute a will, without seeing that it is read over in his presence; but there are many many cases where, according to that case in Bosanquet and Puller, that thing will not be fit to be done in the presence of the witnesses. He may say, the very reason I call for you, who are strangers, to be witnesses is, that none of my family may know what I am doing; and Mr. Justice Chambré puts that in this case. He says it is often the object of men advanced in life to take care that their families shall not know what they are doing; and it is particularly the object perhaps of blind men, who must owe to those about them the whole comfort of their future life, not to put them into the possession of the disposition of their property to take place at their death. July 17. 1823.

The question, I apprehend, then, with respect to this reading, really comes to this—Is reading a solemnity, or is it not? If it be a solemnity, nothing can dispense with it. If you can show that in the common law it was necessary in the case of a blind man, I am then ready to admit that these statutes ought not to affect that doctrine of the common law one way or the other, for they do not take away the necessity of applying the common law by any means; but, on the other hand, if reading be not a solemnity—if it be nothing more than that which a cautious man would endeavour to obtain the effect of, if the testator thought proper to have it read in their presence—if reading is one species of evidence, and only one species of evidence, and the want of that species of evidence be a most important circumstance—perhaps I might state it the most important which can be stated, when you are inquiring whether a party knew what he was doing, or whether, on the other hand, he has been imposed upon—if it is to be put in that way, let the difficulty be what it may of establishing a will where reading is not proved—if it can be shown by other means that the testator knew what he was doing, I apprehend that evidence which produces that satisfaction in the minds of the Jury, is just as good evidence to support that will as the specific fact of reading.

But, my Lords, we must go beyond that, adverting again to this, that the findings upon these Juries are inconsistent upon that fact; for one Jury says, yes, they were read over—and another Jury says, no, they were not read over; and you have those inconsistent findings to act upon. Another question arises, upon whom lies the necessity of proving that there was reading? Provided reading be not a solemnity noticed in the attestation of witnesses, but be a circumstance so absolutely essential, that unless it is proved that that circumstance is one part of the evidence in the cause, the instrument ought not to be available. Now, here is again a very great difference of opinion; some of the Judges say it is upon those who seek to reduce the instrument to show that that did not take place,—while others of them say, in the language of Lord Pitmilly, that the user of the deed must prove that. Now, my Lords, I cannot help thinking, after all the reflection I have thrown upon this subject, that the question will take this turn. If the subscription of a blind man be a good subscription, because he is to be taken to be a man who can

July 17. 1823. do what he does in his own right—if the subscription of a blind man is to be taken to be a good subscription, although there is no subscription by two famous notaries in the presence of four famous witnesses, and if reading be not a solemnity, then it does appear to me, (it may be an error, but I cannot get the better of it,) that the instrument is in itself probative—that is to say, that in as much as if you produce in the case of a man who cannot write an instrument subscribed by two notaries, attested by four witnesses, that instrument is probative—that is to say, that the presumption is in favour of it. I want to know if a blind man can sign because he can write—why it is not to be taken that he can write, if the subscription be a sufficient subscription, and the attestation a sufficient attestation?

Then we have a difference of opinion among the Judges. Some of them think this a probative writ, and that the onus probandi lies upon those who seek to reduce it to prove that it was not read. If reading be not a statutory solemnity, but if it be a circumstance of evidence, if it be a fact, without which you will not give effect to a probative writ, the question is, upon whom is the burden to lie that it was or was not read? Why, my Lords, it is said this is proveable by evidence. It is proveable by evidence; but the misfortune of the case is this, and a circumstance which deserves most serious attention with respect to instruments, if you put it upon those who seek to reduce the deed to prove the negative, you are putting that upon them which they may not be able to establish. In the first place, they may be able to establish that by evidence which some of the Judges say, and which others deny to be necessary, that it was not read in the presence of the attesting witnesses. But, my Lords, put it the other way, what is to be the case? For instance, if it be the law that it need not be read in the presence of the attesting witnesses, but that it must be read in the presence of somebody or other, what is to be the case with respect to a blind man? Now I will put this case to your Lordships: I will suppose, for instance, that Providence thought fit to afflict me towards the close of my life with blindness; that notwithstanding I could write extremely well, and so forth; and that having lived throughout now a very long life on terms of intimacy and affection with my right honourable friend who sits at the other end of the table, and I had Scotch property to dispose of, and was a Scotchman; that I was to say to him, 'You know what provisions 'I have made for my respective children hitherto. You know what I 'have done for A., you know what I have not done for B., you know 'what I have done for the person who may be left a widow, and so on; 'I do not like that strangers should know what I have done, or contem-'plate to do. Will you, therefore, be so good as to make the scroll of 'my will?' My noble friend brings it to me, and I, in acting upon it, act very much upon the confidence I have in that he has executed my purposes. I will take it, a great deal more passes between the two individuals, one of whom I have had the honour of naming, than probably would pass between them; for, as an Englishman making an English will,

I should have no difficulty in saying, 'Have you drawn this out accord- July 17. 1823.
'ing to my intentions?'—'Yes—but you will have it read over.'—'Why
'should I?' I repose confidence in you; you tell me you have given such
'a one so and so, and have given so and so, and put in, God knows how
'many provisions.' I might turn round—and it is not a very unimportant anecdote, that I heard Lord Mansfield say that he had scarcely ever read a deed that he executed in his life—I suppose that referred to his English deeds; what he did as to his Scotch deeds I cannot tell;—but I will suppose the noble Lord reads it over;—that after the reading it over to me, I desire him to be so good as to keep it till a particular day when I mean to execute it;—he brings it, and I execute it before three witnesses who know nothing of the contents of it, as to which it is my intention that they should know nothing of the contents of it, and I subscribe it, and they attest my subscription, for that is all they attest. The noble Lord predeceases me, which I hope will not be the case. What is to be proved? Those who are to claim after my death can only prove it was read over by giving other evidence to satisfy the Jury that I knew the contents of it, and I really do not know how more can be done. It is stated on the one hand, that blind men may be liable to imposition, which they certainly may, and so may men who see, though not so liable to imposition; and when it is stated on the one hand, that they may be liable to that sort of imposition, let it be admitted on the other hand, that if all this is required of them, nobody can tell whether that which he intends will have validity or not, and how long it will have validity. In some of the papers in this cause, they say, to be sure, when it is an old instrument, you are to presume all this;—but I do not know how to get at that; if reading be a solemnity, the reading must be attested, and it must be in the attestation clause that it was read over. If all the witnesses were to die, the moment they were dead all they had attested would be presumed to be read, because they had attested it; but if the reading need be in the presence of the witnesses, or it must be in the presence of the witnesses, but need not be part of the attestation, I do not know how it is to be proved, unless you will take for granted without any evidence whatever that it was so. If you will take for granted, without any evidence whatever that it was so, if there be evidence satisfactory to the minds of the Jury who are to try the fact whether it was his deed or not, validity may be given to the instrument—so it appears to me.

But, my Lords, to return,—the question will be, whether, if the subscription of a blind man is a subscription according to the law of Scotland, and there is an attestation such as the law of Scotland requires to an instrument which can be subscribed by the party, whether that instrument is not therefore in itself probative, and whether the onus of showing that the person was imposed upon, or the onus of showing whether it was not read, (if that is to be taken as conclusive evidence,) is not to be thrown upon those who quarrel with the instrument. You have authority both ways, and I confess, on the best consideration I can give

July 17. 1823. the subject, I think the onus probandi ought to be on those who seek to reduce the instrument.

My Lords, there are other points in the case. Upon the whole, it comes to this, (for I can put it in no other way,) Are you satisfied, upon these imperfect and inconsistent findings, and upon the doctrines stated in these interlocutors, that these interlocutors of the Court of Session ought to be affirmed as to those two deeds, recollecting what has or has not been done with respect to that instrument of November 1808, and recollecting how important a circumstance it was in our English case, that the testator altered the will, and that the alteration was taken as a circumstance of evidence that he knew what he was about in respect of the will itself—recollecting what has or has not passed with respect to this deed of November 1808—are you or are you not satisfied to close this matter as the Court of Session has closed it, and as the Lord Ordinary may close it, with respect to this instrument of November 1808; or do you or do you not think,—regard being had to the nature of these findings,—that the matter requires further investigation; and if it does require further investigation, what is the form in which you will direct that further investigation to be made, and what issues will you direct on the points requiring that further investigation? Your Lordships will be pleased to consider, whether, amongst all those conflicting doctrines, if a general issue, or one or more special issues, are sent to the Jury Court to be tried, where so much doctrine is involved, you are satisfied that your best mode of proceeding would be to send it to the Jury Court, without any determination before you send it there as to the legal doctrines; or whether you are prepared to make up your minds, after all you have heard in this cause, to state, in the present stage of it, your opinion upon those legal doctrines which have already been discussed in the case, and which you are therefore probably competent to determine?

My Lords, with a view of taking the case in the latter mode, I have endeavoured, with the assistance of a noble and learned Lord, to put upon paper that which I may wish again to consider between this and Monday morning; for nothing can be so important as these findings.—I have put down on paper what are the doctrines which I consider as the doctrines of the Scotch law, meaning again and again to consider, till we finally decide whether that is the proper shape in which to put it; but preparing this, in order to have it before us, in case your Lordships should be disposed to consider it in the view I have taken of the case, will assist your Lordships if you should be so disposed. I have endeavoured, with the concurrence and the assistance of my noble and learned friend, to lay before the House some of those findings, which, I think, must be maintained as part of the Scotch law; and, having done so, I will propose now, with your Lordships' leave, that this case be considered further on Monday.

My Lords, I cannot finish what I have taken the liberty to submit to your Lordships, without stating, that I do look upon this as one of the most important cases which we have ever had in this House. I cannot

help saying further, that I claim for this House the recollection of the public, that when we are deciding matters here, we are doing it under an obligation of the highest and most sacred nature, recollecting that what we do decide here is irrevocably decided, and therefore that we are bound to take care—to take abundant and sufficient care—to take over-abundant care, if I may so express myself,—that doctrine is not laid down in your decisions, to which you shall be afraid to apply the character of law irreversible only by Parliament hereafter. My Lords, this is a most important reason for your Lordships deliberating much always before you decide;—it is the duty of every Judge to do so, in every Court in which the justice of the country is administered; but if there be an obligation of greater weight to be laid upon any persons who are concerned in the administration of justice than another, it is upon those who are administering justice here; they desert their duty if they do not decide in defiance of all that can be observed upon it, according to their own opinions; they desert their duty if they ever venture to decide, without having formed those opinions by so much of deliberation as will give them the satisfaction of knowing, after the decision is made, that however other persons may quarrel with it, they have honestly and laboriously endeavoured to decide aright. July 17. 1823.

My Lords, this case is not only of importance with respect to the individual, but it is of great importance with respect to a class of men as unhappy as any whose interests we have to take care of; I mean those who, by human disease and infirmity, and old age, are rendered unable to protect themselves; it is our duty, as far as the law will allow us, to protect them, and to enable them to make their wills without restrictions which that law does not impose. If the law imposes those restrictions, we must in our judgment apply them; but do not let us take upon ourselves to make restrictions with respect to testamentary dispositions of persons which the law has not applied to persons in that state to which I have now alluded.

Having troubled your Lordships thus far, as far as I am concerned in this matter, I beg, with your Lordships' leave, to postpone the further consideration till Monday morning; at the same time, in a case of this great importance, as the noble and learned Lord has, I know, applied his mind very anxiously to the consideration of it, perhaps it might save your Lordships' time on Monday, if at this moment the noble and learned Lord would be pleased to state what occurs to him.

LORD REDESDALE.—My Lords, after what has fallen from my noble and learned friend, I will trouble your Lordships with a very few words upon this case.

The instruments in question are impeached by the summons before your Lordships on two grounds;—1st, That the instrument is not a probative instrument, in consequence of the late Earl of Fife being deprived of the means of seeing, being in the situation of a blind person; and, 2dly, That this circumstance induces a suspicion of fraud, which is suf-

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ficient to avoid the instrument, unless that suspicion of fraud is rebutted by proof of circumstances. Now, my Lords, what is it that constitutes a probative instrument by the law of Scotland? It is where those solemnities which are required by positive law to give validity to an instrument have been complied with. If those solemnities have not been complied with, however it might be the intention of the party to execute the deed, and that the deed should have effect, however consistent it might be with his intention, if those solemnities of law are not complied with, the deed is null and void.

My Lords, whether the solemnities of law have been complied with or not is to appear upon the face of the instrument; for if, on the face of the instrument, it appears that those solemnities have been complied with, then, I apprehend, it is what in the Scotch law is termed a probative instrument.

Now, my Lords, though an instrument may appear on the face of it to be a probative instrument, it is yet capable of being impeached,—that is, it may be impeached on this ground, that the instrument, though apparently a probative instrument, was an instrument imposed upon the person who executed the instrument, and that it was therefore an instrument which was a fraud upon that person; and here it must be assumed, that the ground upon which this instrument is sought to be impeached, supposing it to be a probative instrument, is, that it was a fraud upon the Earl of Fife—that the Earl of Fife did not know what he was doing when he subscribed that instrument.

My Lords, with respect to the question, whether a subscription by a blind man who can write is a proper subscription by the law of Scotland, I am strongly impressed with the opinion that it certainly is, and that that is the mode of executing an instrument which the statute intended; for, my Lords, you will see what was the purpose of the statute in requiring subscription, instead of sealing the seal of the party,—being formerly the circumstance by which it was supposed to be the deed of the party. The statute says, the seal may be feigned;—the statute says, the seal, though the true seal of the party, may be affixed after the death of the party; therefore the statute directs subscription by the party. For what purpose can that be, but because the handwriting of the party is a thing of itself incapable of proof, and cannot be put after the death of the party:—the true handwriting could not,—and if it was not the true handwriting, it must be a forgery. My Lords, it is therefore, in my humble judgment, clear that the signature of this instrument by the Earl of Fife was the proper mode in which he was to execute such an instrument; and I am of opinion, that the signature of the Earl of Fife being affixed to that instrument, it was capable of evidence that that was not his signature. Evidence might be brought to prove that it was totally dissimilar from his signature; but there is no pretence of such evidence,—there is no pretence for the supposition that the signature was not the signature of the Earl of Fife; on the contrary, the summons of reduction supposes it to be the signature of the Earl of Fife, and alleges

circumstances with respect to the manner in which that signature was affixed by the Earl of Fife to the instrument: It supposes that the instrument was brought before the Earl, but that he did not know what were the contents of that instrument to which he so put his signature;—that is, that the proper means were not afforded to him of knowing what were the contents of that instrument; that, from the manner in which it was subscribed, the whole of the instrument not being subscribed at one time, in the same room, and so on, one instrument may have been substituted for another; it is not pretended that he did not mean to sign an instrument, but whether he intended to sign this instrument. July 17. 1823.

Now, my Lords, to what does that all resolve itself, but to a question of fraud, or suspicion that the persons who were then surrounding Lord Fife put before him an instrument which he did not mean to execute, instead of an instrument which he did mean to execute? And that must be the ground and substance of the charge which is brought against this instrument, that there was put before him an instrument which he did not mean to execute, instead of an instrument which he did mean to execute. Why, my Lords, in the execution, by every man having his sight,—a man who is incapable of understanding the contents of a legal instrument, or a person not learned in the law, the instrument is brought to him, and he is told this instrument is to dispose of his property so and so; he cannot, by his own knowledge, know precisely whether that instrument executes his purpose or not, but can that instrument be avoided on that ground? No. You must presume that he did know the effect and purpose of that instrument, unless it is positively shown that a fraud was practised upon him in that respect. It might be the easiest thing in the world to deceive a man who was making his will. He proposes to devise an estate for life, and to entail the property;—he devises to a man for life to trustees to preserve contingent remainders, and then to the heirs of his body. An unlettered man might suppose that the person to whom he gave the estate for life had only an estate for life, and no longer; whereas the construction of law of that instrument would be giving an estate tail, which would enable him immediately to dispose of the property; therefore, my Lords, it is impossible that, in the execution of any instrument whatsoever that is at all an instrument such as the most ignorant person cannot understand, that there must not be a degree of confidence in the persons who prepare that instrument for execution. Why, my Lords, I am sure for myself I have repeatedly executed instruments without having read those instruments, or hearing them read. As a trustee, that has been my practice. I have the misfortune to be engaged in many trusts; I have desired the deed to be laid before an attorney, whom I trust for that purpose; he reports to me that the instrument is properly prepared, and such a one as I ought as trustee to execute. I execute that deed on the confidence that I repose in that person. Many and many a deed have I executed in that way, without reading over the instrument. Perhaps I inquire particularly what it is that the instrument contains; what it is that I am required to do: but I do not read

July 17. 1823. the deed, and I dare say every person in the country has done the same as I have, namely, executed without reading; therefore, my Lords, I hold it would be the most dangerous thing in the world to allow an inference such as is attempted to be raised in this case, to put it upon the user of the deed to rebut any presumption of this kind.

My Lords, I say, in this case, if this deed has the solemnities required by the statute, and is, according to the Scotch law, a probative instrument, those who seek to reduce the instrument must show that there existed some extraneous circumstances, from which it is to be demonstrated that Lord Fife did not mean to execute that instrument. That he meant to execute an instrument cannot be doubted; but then the question is, did he mean to execute that instrument? Now, my Lords, if he did not mean to execute that instrument, it might be because a fraud was practised upon him. I apprehend the law of no country presumes fraud. Fraud is a thing which must be proved; and those who mean to impeach an instrument on the ground of fraud must prove that fraud. It is not the law of one country only, but the law of every country, that fraud must be proved. Statutory regulations are provided to exclude fraud, and if those statutory regulations are not complied with, though there was no fraud, though a man meant to execute the instrument, though he perfectly knew what was contained in the instrument, though he had read it over a hundred and a hundred times, if the statutory solemnities are not complied with, that instrument has no validity in law. Then the necessary conclusion from that is, that if the statutory solemnities are complied with, the instrument, prima facie, is a probative instrument, and is to have faith given to it, until it be shown that it deserves no faith; and there is no ground on which it can be shown that it deserves no faith, but on the supposition that an instrument, different from that which the man intended to execute, was placed before him, and that he was prevailed upon to execute one instrument when he intended to execute another.

Now, my Lords, does it appear in this case, from any thing found by the Jury, or which has been suggested in idea, that Lord Fife meant to execute an instrument different from that which has been laid before your Lordships? It is clear he meant to execute an instrument. If the solemnities required by law are complied with, I say the presumption of law is that he meant to execute that instrument; and it would be most dangerous indeed if it was not the presumption of law that he meant to execute that instrument. It is clear, therefore, to my mind, that whoever attempts to impeach an instrument under such circumstances, the impeachment of that instrument must lie upon the person so seeking to set aside that instrument.

My Lords, it is open to the party seeking to set aside the deed to show that the granter did not mean to be party to such a deed as has been executed; it may be shown that he was not a party to the deed: that may be proved, or may be extracted from the witnesses; they may perhaps be led, on examination, to admit the fraud—to admit, for instance, that the instrument Lord Fife executed was a different instrument from that he

meant to execute. The witnesses, indeed, would not meet with much credit, for they would be confessing their own infamy. However, it might still be done; it might be shown by other evidence, as in the case of Aglionby, that the man was imposed upon in the transaction, that he did not know what he was doing. The truth was, in that case there was a deficiency almost of faculties in the person. There was no pretence of deficiency of faculties in Lord Fife. The only ground upon which this instrument is impeached is this, that it does not appear but that Lord Fife might have executed an instrument which was not the instrument which he meant to execute, though he meant to execute an instrument. Now, my Lords, I conceive that the proof of that must necessarily lie upon those who impeach the instrument, that it must be taken to be the instrument he meant to execute, unless the contrary is shown by evidence. July 17. 1823.

Then, my Lords, consider the effect of the subsequent deed of November altering the trust-deed. My Lords, is there any doubt, that if he executed that instrument as a probative instrument, and it was a probative instrument, that is most important to show that no fraud was practised upon him in respect of the instrument. When a man says, the instrument I have executed does not convey that which is now my meaning upon the subject, can there be a stronger presumption that he knew what was the meaning of the instrument he had executed? He executes an instrument by which he alters a part of the disposition; the second instrument was executed and attested, and if he knew what he was about when he executed that, can he have executed it without a confidence in his own mind that the instrument he had previously executed was an instrument prepared according to his intentions? My Lords, I conceive, therefore, that the law of Scotland, and the law of every country, must, in case of fraud, proceed exactly on the same ground. Fraud is every where the same. The provisions that are made by statute to prevent fraud are positive provisions, and, whether fraud existed or not, must be complied with. But if those provisions are complied with, then, if fraud is imputed to an instrument, with respect to which those provisions are complied with, the presumption must be in favour of the deed; and the presumption being in favour of the deed, and the evidence of any fact which would tend to impeach the deed must be produced by those who seek to set it aside.

My Lords, when we look in this case to the finding of the Jury, we find that on the trial of the first issues that were tried, the Jury expressly found that the deed was read over to the Earl of Fife; they expressly found that on another of the issues which had the same tendency. A new trial was granted, and it was granted on this ground, that only one witness proved the fact that it was read over to him. That was proved by a witness who deposed that it was read over in the presence of that witness and another person; but that other person, it seems, stands in a situation with respect to the instrument, (being one of the trustees of the trust-disposition,) that he is not capable of being examined as a witness; —the single evidence of one witness is not sufficient, in the law of Scotland, to establish a fact. Now, my Lords, though the evidence of one

July 17. 1823. witness is not sufficient, in the law of Scotland, to establish a fact, is not the evidence of such a witness sufficient to rebut the contradictory testimony, and at least to throw it as matter of doubt before a Jury? But there is no evidence that it was not read over; on the contrary, all the evidence which exists upon the subject is that it was read; and yet there being no evidence that it was not read to him, the Jury have found that it was not proven that it was read—that is, that it was not proven, because, according to the law of Scotland, two witnesses were necessary to prove that fact. My Lords, is that sort of negative finding to overturn an instrument which is in fact probative, and which is to have effect, unless matter has been shown to avoid its effect? My Lords, if the reading is not a solemnity required by statute—is not a solemnity required by law, but is merely a circumstance from which it is, or is not to be inferred, that the instrument was the instrument which the party intended to execute; then, I say, finding it is not proven upon that issue is finding nothing at all.

My Lords, let us advert a little to what must have been the state of things before this act. Why, my Lords, almost all deeds were formerly in Latin, executed by persons who did not understand the Latin language; even if they understood the operation of law upon the words used, they did not understand the Latin language. My Lords, we find it said that if a question arises, whether a man is required to execute a deed which is presented to him, if the deed is in Latin, he has a right to have it explained to him before he is compelled to execute it; it must be explained to the party if it is in Latin, because he is not to be supposed to understand the Latin language: but what is the presumption of law in the absence of all proof? The presumption of law is, that it was fairly explained to him, unless the contrary is shown; and if he executed the deed without requiring it to be explained to him, would you therefore avoid that deed? That, if it were established, must extend not simply to a deed of this description, but to a deed upon contract; and your Lordships will at once see how far that will go. If Lord Fife had signed a contract for the purchase of an estate, he might, according to the principle of this case,—at least I am not aware of the answer to it,—have avoided that contract on the ground that he was blind, and therefore might be imposed upon; for that is the ground upon which this case is presented to your Lordships;—that it is to be presumed that an instrument, executed and attested by witnesses in due form, was not the instrument he intended to execute, because, being blind, it is not proven that it was read over to him.

My Lords, it does appear to me that some of the principles upon which the decision in this case have proceeded are so dangerous to the public, and would lead, if carried to the utmost, to such an extent, that, upon that ground alone, it is absolutely necessary this case should be reviewed. The manner in which the learned Lord on the Woolsack has proposed it should be reviewed, appears to me well adapted to the purpose of bringing before the Jury that case which may be properly brought before them, and which I take to be the only true question in this case, supposing the

deed to be a probative deed; that is, whether Lord Fife, meaning to execute a deed, a fraud was practised upon him, and another deed substituted instead of that which he meant to execute; for if it is not proved that a fraud was practised upon him, and another deed substituted instead of that he meant to execute, this deed, in my humble judgment, cannot be set aside. July 17. 1823.

LORD CHANCELLOR.—My Lords, since I had the honour of last addressing your Lordships, I have endeavoured to execute that purpose which I mentioned the other day as desirable to accomplish; and recollecting what is the extreme importance of this case, it appears to me that it may not be improper that your Lordships should permit me to tender this paper as the judgment proposed to your Lordships, and that the matter should be taken into consideration again on Wednesday or on Thursday. In the mean time, this paper being inspected by both parties, I am the rather anxious that that should be so, because it occurs to me to recollect (unless I mistake the fact) that, in what fell from myself, there was one point to which I did not advert—I mean with respect to the acknowledgment by the late Earl of Fife of the subscription; and care has been taken in this paper, that while it is proposed to your Lordships to express that the onus probandi that there was no such acknowledgment falls upon the pursuer, yet it is fit it should be clearly stated here, that it is competent to the defender to prove that the acknowledgment was made. If the acknowledgment was not properly made, it will be no difficult matter to prove the negative. At any rate, this paper contains an allusion to that circumstance, which I forgot to make in what I stated to your Lordships the other day. My Lords, at present, therefore, I shall trouble your Lordships no further than by delivering this paper, and desiring that it may be copied, and that both sides may have an inspection of it, with a view to stating any thing they may wish to represent upon the subject.

My Lords, I cannot conclude this without saying—(I hope there is no occasion for saying it, but it will do no harm)—that the case has been argued at the Bar without any observation falling from any body upon the conduct of the parties, either those who are pursuers, or those who are defenders. I hope nothing that can form matter of reflection on either has fallen from any person who has had the honour of addressing your Lordships. I know nothing of the kind fell from my noble and learned friend. I can say for myself, that it was the thing the farthest in the world from my wish that any thing of that kind should fall from me. A circumstance makes it perhaps not improper that I should say, that I do not think that Lord Fife would have done his duty to himself if he had not instituted this cause, and that it is on his part a very honourable cause to institute; and, on the other part, I think that the persons claiming under the deed would not have done their duty if they had not resisted this suit; and that there appears to be no imputation whatever on the moral conduct or the honour of any person whatever concerned.

July 17. 1823. *Appellant's Authorities.*—(1.)—Ayton, Feb. 5. 1742, (14935.)—(2.)—1541, c. 117; 1579, c. 185, or c. 80; Vin. Inst. 292; 3. Heinec. Antiq. 10. 18; 6. Cod. 21. 1; Couts, June 21. 1681, (6842); 1. Bank. 11. 3; Falconer, Jan. 9. 1751; 2. Elch. *voce* Writ, No. 26; Bell on Testing Deeds, 205. et seq.; 2. Bos. and Pul. 2. 17; Peake, N. P. 148.

Respondent's Authorities.—(1.)—Hamilton, Dec. 21. 1621, (7799); Mar, June 23. 1612, (7798); Ballantine, Jan. 5. 1675, (7807.)—(2.)—Falconer, Jan. 9. 1751, (16817); Ross, June 11. 1794, (582); Bain *v.* Belshes, not reported; Wilson *v.* Pringles, May 13. 1814, not reported.

J. CHALMER,—SPOTTISWOODE and ROBERTSON,—Solicitors.

(*Ap. Ca. No.* 26.)

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2. That it is competent to reduce an act of contravention after the death of the contravener.
3. That although it is competent to an heir-substitute to bring a declarator of contravention against a contravening heir of entail in possession, yet his failure to do so, and the circumstance of not objecting to improvements made by a tenant possessing under a lease granted contrary to the entail, do not bar the heir-substitute from reducing the lease;—and,
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LATENT BURDEN.—See *Sale.*

LEASE.—See *Entail.*

LEGACY.—Circumstances in which it was held, (reversing the judgment of the Court of Session,)

1. That there was not sufficient evidence of a claim made against the trustees of a defunct for recompense on account of labour, over and above wages paid during the life of the deceased; and,

2. (affirming the judgment,) That a legacy bequeathed by the defunct to the party so claiming recompense could not be imputed in extinction pro tanto of such claim, even if it had been duly established, No. 37. p. 164.

LIEN.—See *Sale.*

MANSE.—Held, That where a manse has been built and has become ruinous, the first clause of the statute 1663, c. 21, relative to the building of manses, and limiting the expense to £1000 Scots, does not apply; but that the second clause as to repairs, and which is unlimited, is applicable; and therefore the judgment of the Court of Session, awarding £1000 sterling, was affirmed, No. 3. p. 10.

MARRIAGE.—Circumstances under which it was held, (affirming the judgment of the Court of Session,) That a marriage had been constituted by a promise subsequente copulâ, No. 58. p. 440.

MASTER AND SERVANT.—Circumstances in which it was found, (reversing the judgment of the Court of Session,) That a mistress was entitled to dismiss a servant who had been absent from his service for four days without leave, No. 28. p 124.

MEDITATIO FUGÆ WARRANT.—Circumstances under which it was held, (affirming the judgment of the Court of Session,) That it is not a sufficient ground of suspension of a meditatio fugæ warrant, that the oath of the petitioner and the declaration of the defender have been taken by the clerk and assessor of a royal burgh acting in virtue of a commission by the Magistrates,—the warrant bearing to have been issued by a Magistrate, on considering the oath and declaration, No. 48. p. 257.

MEMBER OF PARLIAMENT.—See *Freehold Qualification.*

MERCANTILE AGENT.—See *Sale.*

MILITIAMAN — *Stat. 54. Geo. III. c.* 19. — Held, (affirming the judgment of the Court of Session,) That a corporal of the First or Highland Regiment of Local Militia for the county of the city of Edinburgh having volunteered his services, and served at Musselburgh in terms of the above statute, was entitled to the privileges of a freeman, without entering with the incorporation of the particular trade which he exercised, No. 30. p. 128.

MUTUAL CONTRACT.—A tenant having entered into an agreement with his landlord to renounce his lease at a particular period in consideration of a certain sum, and the landlord having prior to that period become bankrupt, and conveyed his estates to trustees—Held, (reversing the judgment of the Court of Session,)

1 That the tenant had no right to insist that the trustees should

accept of the renunciation, and pay the stipulated price, but that he was bound to elect either to retain his lease, or rank as an ordinary creditor under the trust for the price; and,

2. That there were not sufficient circumstances alleged to infer an adoption of the agreement by the trustees, so as to bind them to implement it specifically, either officially or personally, No. 36. p. 159.

MUTUAL CONTRACT.—An estate having been left to a natural son, on condition of not marrying a certain lady, under a penalty of forfeiture in favour of the testator's brother, who was in India; and having made a compromise with the attorneys of the brother, (knowing that they had no authority to do so,) by which he agreed to marry and forfeit on condition of payment of one half of the value of the estate; but reserving to the brother to say whether he would put any value on the mansion-house and political interest of the estate; and having married, and decree of forfeiture being pronounced against him in favour of the brother, (who hitherto was ignorant of the transaction); and the brother having afterwards taken possession and paid the stipulated value, but declined to put any value on the house and political interest; and the son having declared that he had no legal claim against him; but thereafter having brought an action against him for one half their value, and the Court of Session having valued them, and decerned against the brother, the House of Lords reversed the judgment, No. 53. p. 365.

PARTNERSHIP.—It having been stipulated in a contract of copartnery, that in the event of the death, withdrawing, or bankruptcy of a partner, the remaining partners should grant bond for his share of the last annual balance; and one of the partners having died; and thereafter all the remaining partners (with the exception of two) having become bankrupt; and an action having been raised by the representatives of the deceased partner against the two solvent partners; and the Court of Session having sustained the action against them, but assoilzied them on the merits—Held, (reversing the judgment,) That the claim of the representatives lay not against these two partners alone, but against all the other partners jointly, including those who had become bankrupt, and that these persons ought to have been called as defenders; and a remit made accordingly, No. 41. p. 220.

——— Circumstances under which it was held, (reversing the judgment of the Court of Session,) That a bill granted by a partner under the partnership firm for a private debt, but whereby it was alleged an advantage was derived by the Company, was not binding on it, No. 45. p. 244.

——— Circumstances under which it was held, (affirming the judgment of the Court of Session,) That there was no evidence of the respondent being a partner of a company indebted to the appellants, No. 64. p. 481.

PATENT.—The Court of Session having found that the specification of a patent was not sufficiently expressed to entitle the patentee to pursue an action for violation of it, a remit made to ascertain this and other facts by a jury, No. 17. p. 54.

PERSONAL OBJECTION.—See *Entail.*

PRESCRIPTION. — A party who possessed an estate under an entail, prohibiting, inter alia, any alteration of the course of succession, having, by his son's contract of marriage, bound himself to con-

vey the estate to a different series of heirs, and under different conditions from those in the entail, agreeably to which he granted a disposition and procuratory of resignation; and, in expeding the charter of resignation, the conditions and order of succession in the entail having been introduced historically in describing the lands; but the conveyance of them being made in terms of the marriage-contract, and under the conditions 'supra script.;' and sasine having been taken accordingly, and possession enjoyed for forty years — Held, (affirming the judgment of the Court of Session,) That the original entail was superseded, and that the charter and sasine formed the governing investiture of the estate, free from the limitations of the entail, No. 56. p. 401.

PRESCRIPTION.—See *Res Judicata.*

PROCESS.—Held, That it is not competent to sist a respondent in the House of Lords in place of one who has died, and against the former of whom a personal objection not pleaded in the Court of Session is alleged to exist; and that, in order to obtain such respondent sisted in the Court of Session, the process must be remitted back from the House of Lords, No. 38. p. 169.

——— See *Appeal—Burgh Royal—Jury Court—Partnership—Title to Pursue.*

PROOF. — Held, (affirming the judgment of the Court of Teinds,) That an old extracted decree of valuation, in which the numerical word fixing the value had been almost entirely worn away, and a hole left, could not afford evidence of the value of the teinds, although it was the opinion of persons of skill that the word must have been either 'ten' or 'twa,' No. 2. p. 5.

——— Held that, in particular circumstances, parole evidence explanatory of the situation of marches is admissible, although there be a written contract in relation to them, No. 25. p. 109.

——— Circumstances in which it was held, (affirming the judgment of the Court of Session,) That the description of a person in an ancient deed as filius carnalis did not prove that he was illegitimate, No. 35. p. 157.

——— SEMIPLENA PROBATIO.—1.—Circumstances in which a criminal intercourse between the mother and the alleged father of a bastard, prior to the time when the child must have been begot, held not to amount to a semiplena probatio; and,

2. A stepmother held not an admissible witness for her stepdaughter, although the husband had been dead for upwards of sixteen years, No. 24. p. 111.

——— See *Marriage.*

PROPERTY.—Held, ex parte, (reversing the judgment of the Court of Session,) That it is competent for the Dean of Guild of Edinburgh to authorise proprietors of piazzas in Edinburgh to build them up, No. 59. p. 452.

PROVISIONS TO CHILDREN.—A father having made certain mortis causâ provisions in favour of his younger children, and disponed, mortis causâ, his whole estates, real and moveable, to his eldest son, subject to these burdens; and having thereafter bound himself in his eldest son's contract of marriage to leave his whole estates to him, under burden of the provisions 'made by him for his younger children;' and having thereafter advanced to them large sums during his life, and granted to them additional provisions, partly of a permanent nature, and partly

payable at his death; and the Court of Session having held, that as the provisions made prior to the contract of marriage were fit and proper, it was not competent for the father thereafter to increase them, and that sums paid to the children during his life, must be imputed in extinction of the original provisions:—The House of Lords found, That the question was to be decided by the sound construction of the above clause; and that as the exception in the contract of marriage referred to provisions payable mortis causâ, he was not barred from advancing sums to the younger children during his life; but that all provisions of a permanent nature, or payable after his death, were in fraudem of the contract, and were to be imputed in extinction of the original provisions, and, quoad ultra, ineffectual, No. 50. p. 308.

Public Officer.—Held, ex parte, (reversing the judgment of the Court of Session,) That public officers are not entitled or compellable to produce written communications made to them officially relative to the character and conduct of a party applying for a public office,—the productions being demanded with a view to an action of damages against the writer, No. 43. p. 229.

——— See *Reparation.*

Pupil.—See *Sale.*

Purgation.—See *Entail.*

Recompense.—See *Legacy.*

Reduction.—See *Fraud.*

Rehearing.—See *Appeal.*

Relief.—See *Landlord and Tenant—Teinds.*

Reparation.—Held, (affirming the judgment of the Court of Session,) That a landed proprietor residing at a distance from his estate, was not liable in assythment to the widow and children of a person who was killed by the fall of a tree growing on his property, and which his servants were cutting without his orders, No. 6. p. 20.

——— Held, (reversing the judgment of the Court of Session,) That an allegation against a defender of having instigated other parties to do an injurious act to the pursuer, was competent to be proved, although these parties were not called as defenders, No. 16. p. 48.

——— Held, (affirming the judgment of the Court of Session,) That damages are due for a blow inflicted with a heavy iron bar on the head, to the danger of life, although the party so struck had previously given a slight blow or push with his hand, and was alleged to have begun the affray, No. 29. p. 125.

——— Circumstances in which it was held, (reversing the judgment of the Court of Session,) That a pursuer having alleged that he had been dismissed from a public office in consequence of the false allegations of certain parties, and had otherwise suffered damage from their acts, was not entitled to recover damages against them jointly and severally, it appearing that the representations and acts alleged by him were not done jointly and severally by the defenders, No. 39. p. 179.

——— Question raised, but not decided, whether an action be relevant for damages on account of representations made, on probable grounds, against a public officer to his superiors in office, and in consequence of which he was dismissed? No. 39. p. 179.

Representation.—See *Insurance.*

Res Judicata.—An heir of entail having brought an action of reduction of certain deeds as in contravention of the entail, and concluding

for forfeiture of the heir in possession, and to find her entitled to the estate; and the defender having been assoilzied; and she having thereafter brought another action founding on the deeds as valid, and as giving to her a right to the estate in preference to a succeeding heir—Held, (affirming the judgment of the Court of Session,) That the decree of absolvitor did not form a res judicata to bar the second action; but the Court of Session having assoilzied on the merits, the House of Lords remitted for review, and for the opinions of all the Judges, No. 49. p. 265.

RETOUR.—See *Freehold Qualification.*

SALE.—A party having sold an heritable property, on condition, inter alia, that the purchaser should procure him an ensigncy in the army, and pay a debt affecting the property; and it having been afterwards ascertained that the debt exceeded the sum specified, and that inhibitions had been executed; and the purchaser having refused to procure the ensigncy till the property was relieved from these incumbrances—Held, (reversing the judgment of the Court of Session,)

1. That the purchaser was liable only for interest on the price of the ensigncy, and not for the pay and emoluments thence arising; and,
2. That he was entitled to insist, before payment, that discharges of the real burdens should not only be produced, but that they should be duly recorded, No. 32. p. 134.

—— JUDICIAL, UNDER ACT OF PARLIAMENT.—Held, (reversing the judgment of the Court of Session,)

1. That sales made of part of an entailed estate in a process raised in virtue of an act of Parliament, requiring the heirs of entail to be called as parties, were inept, the next succeeding heir having been cited, but being a pupil, and no tutor ad litem having been appointed;—and,
2. That it was not a sufficient defence that the warrant of his appointment could not be required to be produced, as twenty years had elapsed, there being no statement in the extracted decree, or a recital of an interlocutor, that a tutor ad litem had been appointed, No. 51. p. 333.

—— A mercantile agent having sold goods andtaken the purchaser's bill, which he guaranteed and indorsed to the owner of the goods; and the purchaser having become bankrupt, and the owner having accepted of a composition on the bill, and delivered it up—Held, (reversing the judgment of the Court of Session,) That the agent was not entitled to withhold delivery of the goods from the purchaser, till relieved of the effect of his guarantee, No. 54. p. 389.

—— Circumstances under which it was held, (affirming the judgment of the Court of Session,) That a purchaser of an estate was entitled to be relieved of a latent burden created by a subtack, and which could not be discovered from the rights on which the tenants possessed, No. 60. p. 455.

SEMIPLENA PROBATIO—See *Proof*

SEQUESTRATION.—Held, (affirming the judgment of the Court of Session,)

1. That a coal-lessee dealing in coal, although not buying it, is liable to sequestration;—and,
2. That it is no objection that the affidavit of the creditor applying for sequestration has been made before a Justice of the Peace in Ireland, No. 47. p. 254.

SERVICE.—Held, ex parte, (affirming the judgment of the Court of Session,) That a service founded on by the appellant was null, being unsupported by evidence, No. 61. p. 459.
SHIPMASTER.—See *Charter-Party.*
SINGULAR SUCCESSOR.—See *Landlord and Tenant.*
SLANDER.—See *Reparation.*
SOCIETY.—See *Partnership.*
STAT. 1597, c. 185.—See *Title to Pursue.*
—— 1633, c. 21.—See *Grass Glebe.*
—— 1663, c. 21.—See *Manse.*
—— 1690, c. 23.—See *Teinds.*
—— 16. Geo. II. c. 11.—See *Burgh Royal—Title to Pursue.*
—— 54. Geo. III. c. 19.—See *Militiaman.*
—— 54. Geo. III. c. 137.—See *Sequestration.*
—— 55. Geo. III. c. 42.—See *Jury Court.*
—— 57. Geo. III. c. 53.—See *Property.*
—— 59. Geo. III. c. 35.—See *Jury Court.*
SUPERIOR AND VASSAL.—Held, (affirming the judgment of the Court of Session,) That a clause by which a superior reserved in a feu-contract right to the mines and minerals, did not give him right to a quarry of freestone situated within the lands, No. 42. p. 225.
TAILZIE.—See *Entail—Process—Res Judicata.*
TEINDS — RELIEF — *Stat.* 1690, *c.* 23. — The patron of a parish having acquired a tack of all the teinds of the parish, which was subsequently prorogated; and having assigned part of the teinds so held by him to a third party, who was to bear the burden of future augmentations, &c. according to an equal proportion with the rest of the teinds of the parish; and thereafter the patron having acquired right by the statute 1690, c. 23, to the teinds of the parish not heritably disponed, and an augmentation having been subsequently granted to the minister—Held, (remitting with special findings to the Court of Session,) That, in a question with the patron and cedent, the assignee was only liable to be allocated in proportion to the other teinds of the parish, and that the patron could not insist on the teinds so assigned by him being entirely allocated primo loco, No. 66. p. 485.
TESTAMENT.—Held, (reversing the judgment of the Court of Session,) That a testament executed by a Scotchman who had long resided in India, and to which a seal had been attached, but which had been cut off, was revoked, although he was domiciled in Scotland, and the deed was holograph of, and subscribed by him, No. 20. p. 65.
TITLE TO PURSUE.—1. Whether an action of reduction of the titles of a freeholder, in order to found an objection to his enrolment, is competent after the lapse of the period specified in the 16th Geo. II. c. 11.
2. Whether a freeholder, merely as such, has a title to insist for reduction of the titles of another freeholder.—Held in the affirmative by the Court of Session, but remitted for reconsideration, No. 11. p. 30.
——— —1. Whether it is competent for a freeholder, merely qua such, to insist in a reduction of the titles of a party who has not actually claimed to be enrolled, but has made up titles with that view; and,
2. Whether, if it is not, the objection to the title to insist in that

action can be removed by the defender being enrolled pending the process. The Court of Session having found in the negative on the first point, and in the affirmative on the second, case remitted for reconsideration, No. 12. p. 35.

TITLE TO PURSUE.—Held, (affirming the judgment of the Court of Session,) That a party who was served heir of line to the granter of an entail and trust-deed, was not prevented from reducing them by the existence of a prior entail and trust-deed, under which he was called as an heir of entail, but excluded from possessing during his life, No. 68. p. 498.

TRUST.—See *Mutual Contract.*

TRUSTEE.—Held, (affirming the judgment of the Court of Session,) That gratuitous trustees, acting bonâ fide in the supposed discharge of their duty, were not liable in damages, No. 16. p. 48.

VALUATION.—See *Proof.*

WITNESS.—See *Proof.*

WRIT.—Held, (reversing the judgment,) That blindness is not per se a legal incapacity from signing a deed; and that such deed being ex facie probative, it is incumbent on the party objecting to show that it has not been executed in terms of the statutes, No. 68. p. 498.

ERRATA IN VOL. I.

P. 13, No. 4, line 4th of title, after the words "on the roll," add *a summary complaint for removing them was incompetent.*
P. 64, No. 19, line 3d of title, for *it* read *and;* and delete *and.*
P. 78, line 8th, for *are you* read *you are.*
P. 99, No. 92, line 1st of title, delete—1.—
P. 132, line 8th, for *to* read *do.*
P. 157, line 3d from foot, for *ground* read *grounds.*
P. 220, No. 41, 2d line of title, for *of partners* read *of a partner.*
P. 238, No. 44, 5th and 6th lines of title, delete *in the mean while.*
P. 272, 3d line from foot, delete *that.*